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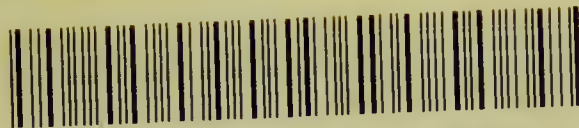
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LEGAL DECISIONS
UNDER THE
MEDICAL AND DENTISTS ACTS



DECISIONS

OF THE ENGLISH SCOTTISH AND IRISH
COURTS UNDER THE MEDICAL
ACTS 1858 TO 1886 AND THE
DENTISTS ACT 1878

Collected for the GENERAL MEDICAL COUNCIL
and arranged with Introduction and
Notes, by

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PREFACE

IN the year 1897 the General Medical Council printed for the private use of its members and officials a small volume of reports of the cases in the higher Courts in which the action of the Council in the exercise of its disciplinary powers had been called in question. This book, which also contained reports of three other cases of interest to the Council, having been for some time out of print, I was directed to prepare a new edition. On taking up the task I failed to find that, during the fifteen years which have elapsed since 1897, any serious attempt had been made to challenge any decision of the Council. But I found that the reported cases on other matters within the Medical and Dentists Acts were much more numerous than I had supposed ; indeed that, from the passing of the earliest Medical Act in 1858 to the present day, there have been altogether more than fifty decisions, including some of great interest and importance, under the Acts. These decisions had never, as far as I knew, been collected in one volume, and if this could now be done it seemed that the interest and usefulness of the book which the Council had in view would be much increased. It was therefore decided to include all the reported decisions of the higher Courts of the three Kingdoms upon cases under the Acts, and, in view of the wider interest thus possessed by the book, to make it available to the public. The present volume is the result.

By the "higher" Courts I mean the High Court of Justice and the Court of Appeal in England, the corresponding Courts in Ireland, the High Court of Justiciary in Scotland, and the House of Lords. The cases collected here have all, with one exception, been decided in one or other of these Courts. The exception is a decision as to the wilful and false assumption of a registered title given at the County of London Sessions under section 40 of the Medical Act of 1858; and I have included it because, for reasons which are given in the Introduction, it seems to me not improbable that in similar circumstances the view there taken, rather than that taken in a later case in the High Court, would prevail to-day.

Although I have spared no pains to make the present collection of cases complete there may be decisions which have escaped my notice. In the Scottish reports I have found only one, albeit a very important one, under the Dentists Act, and one under the Medical Acts. I shall be grateful to be informed of any omissions.

A complete collection of legal decisions, covering a period of over fifty years—that is, from the passing of the Medical Act of 1858 to the present day—might be expected to contain some matter which is no longer of living interest, and the present volume is open to this comment. Some cases are reprinted here which bring to memory "far off things, "and battles long ago." In 1859, for example, the Council was concerned to know whether the University of London must refer the election of its representative on the Council to the whole body of its graduates or whether the vote of the Senate alone would suffice, and this question was litigated. Two years later came an encounter between the Physicians and the Apothecaries concerning the right of

the Royal College to allow its licentiates to supply medicine to their patients. That was decided in favour of the College. Again, we find one Thistleton, unregistered, self-described as "a mechanical operative galvanist" who had "studied "to unite the various remedial agencies, which he has found "so effective separately, into one grand and resistless "process," suing in respect of materials and electric fluid, and about to get a judicial decision upon the question whether the application of galvanism by a galvanic operator was performing an operation within section 32 of the Act; when some one, at a late stage of the case, made the discovery that, postponed by the Act of 1860, the section had not come into operation when the action was begun, and the defence collapsed. These matters and others, all doubtless of importance in their day, are no longer of any moment; but none of them is without historical interest, and after all they occupy but a small part of a book which would be incomplete without them.

Besides reprinting the decisions in full I have written a short Introduction containing a brief review of them, and I hope this may be of some assistance in studying the numerous and sometimes rather perplexing decisions which have been given by many different Courts on some of the sections of the Acts. This Introduction has had the great advantage of being read in proof by Sir Donald MacAlister, K.C.B., M.D., the President of the Council, and by Mr. Norman C. King, the Registrar, whose knowledge and experience have, I hope, enabled me to avoid any errors of fact; but the views which I have ventured to express are my own, and have no official authority. The decisions themselves are printed in chronological order, and at the head of each will be found a list of the references to the case in the Council's

Volumes of Minutes. My few annotations are placed within square brackets []. Some longer notes and other information, and a full index, will, I hope, be found to be practical and useful.

Finally, it is with pleasure that I tender my thanks to the proprietors of *The Law Journal Reports*, *The Law Times Reports*, *The Solicitors' Journal and Weekly Reporter*, *The Justice of the Peace* and *The Times Law Reports* in England, of *The Session Cases and Justiciary Reports* in Scotland, of *The Irish Law Times*, *The Irish Common Law Reports* and *The New Irish Jurist Reports* in Ireland, and of *The British Dental Journal*, for permission to reprint the reports of the cases which appear in this volume.

CHARLES J. S. HARPER,

LONDON, *October* 1912.

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INTRODUCTION

THE Medical Act of 1858, which came into force on the 1st of October of that year, declared it to be expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners, called into being the General Council of Medical Education and Registration of the United Kingdom, and entrusted to it the task of making and keeping "The Medical Register" and of publishing "The British Pharmacopœia." The Act conferred wide powers upon the Council in order that it might maintain, by the supervision of courses of study and examinations, the standard of professional knowledge of those about to enter the profession; and, by the power of erasure from the Register, the standard of professional conduct of registered practitioners. There followed a series of amending Acts, chief among which may be noted that of 1862, which granted incorporation to the Council; the Act of 1876, which empowered every body entitled to grant qualifications for registration to do so without distinction of sex; and the Act of 1886, which contained a number of provisions as to qualifying examinations, effected some changes in the constitution of the Council, gave registered medical practitioners direct representation on the Council, and modified the provisions for the registration of colonial and foreign practitioners.

Some twenty years after the passing of the first Medical Act came the Dentists Act of 1878, which for the first time

gave the practitioner of dentistry a legal status by providing for examinations in dental surgery, by instituting a Register, and by prohibiting any unregistered person from calling himself dentist or dental practitioner, or by any name title addition or description implying that he was registered or was specially qualified to practise dentistry. The General Medical Council was entrusted with the keeping of the Register and was given powers in connection with that duty similar to its powers under the Medical Acts, although the machinery for exercising them is somewhat different and simpler. The Act of 1878 has been amended by a section, the 26th, of the Medical Act of 1886 which widens the scope of the prohibition as to title addition or description and enables a private person to institute any prosecution under the Act without the consent of the Council.

It will thus be seen that the General Medical Council is not intended, as is sometimes supposed, to act as the guardian of the interests of medical and dental practitioners. The charge committed to its care is that of maintaining, in the interest of the whole community, a high standard of professional education and a high standard of professional conduct. The duties entrusted to the Council could not, it is true, be performed adequately except by those who have received a professional training and have engaged in the practice of the profession; and therefore all the members of the Council are, and have always been, registered practitioners. But, with the exception of those members who represent the medical corporations (i.e., the bodies in the United Kingdom, other than universities, which are competent to grant diplomas conferring the right to medical registration) and of those who directly represent the registered practitioners, there is no provision in the Acts which requires that a member shall be qualified for registration in either Register.

In one of the earlier decisions under the Medical Act of

1858, *Regina v. Steele*, decided in 1861, Lord Chief Justice Lefroy, of the Irish Court of Queen's Bench, speaking of the Act, said :—"This Act is deserving of what, with all deference to the Legislature, I may say is a rare compliment. It is an Act drawn with peculiar accuracy." Fifty years have passed, and few with practical knowledge of the working of the Act would now endorse without qualification this rather optimistic dictum. Already by 1861 there had been eight decisions upon disputed points under the Act, and there have been many more since as the following pages show. All the Acts extend to England, Scotland and Ireland, and the higher Courts of all three Kingdoms have contributed to the work of their elucidation. The sections which are responsible for this judicial activity are however few in number, and indeed sections 29, 32 and 40 of the Act of 1858—dealing respectively with erasure from the Register for criminal offences or professional misconduct, with the right to recover fees, and with the assumption of false titles—have occasioned all but five of the thirty-five decisions on the Medical Acts, while twelve of the nineteen cases under the Dentists Act have been decided upon its third section.

In the present volume these decisions are reprinted in two groups, (1) medical and (2) dental, and those of each group are given in the order of date on which the judgments were delivered. This arrangement has at any rate the merit of chronological order to recommend it, and it avoids the difficulties attendant upon any attempt to group decisions according to subject matter, where, as here, several sections of the Acts are sometimes discussed in the same case. But it was thought also that a short review of the decisions, arranged for the most part in the order of the sections of the Acts, would be found of use to those who have occasion to study the Acts and their judicial interpretation, and this review is accordingly given here.

I. THE MEDICAL ACTS

ACT OF 1858, SECTIONS 15, 16, AND SCHEDULE (A)
ACT OF 1859.

We may conveniently begin with the case of *Regina v. Steele* (a) already alluded to. This was decided by the Irish Court of Queen's Bench on 10th June 1861 and involved a consideration of the 15th and 16th sections and Schedule (A) of the Act of 1858, and of the amending Act of 1859. The case is of special interest because of its general presentation at this early date of the objects and scope of the two Statutes. A practitioner, holding the diplomas of Licentiate of the King's and Queen's College of Physicians of Ireland and Licentiate of the Royal College of Surgeons in Ireland, was registered "M.D." in connection with the former by the Registrar of the Irish Branch Council. This was not in accordance with the Statute, and the Branch Council directed him to expunge the title of "M.D." This he did without notice to the practitioner, who thereupon brought proceedings for the restoration of the letters to the Register, but without success.

ACT OF 1858, SECTION 4.

The earliest decision of all, that of *Regina v. Storrar* (b) on 15th June 1859, was under this Section. Mr. Storrar, the representative of the University of London upon the Council, had been elected by the Senate of the University, and the question for decision was whether, having regard to the terms of the University's Charter and section 4 of the Act, the power of election was vested in the Senate or in the entire University. The Court decided that Mr. Storrar had been duly elected by the Senate.

(a) See *post*, page 43.(b) See *post*, page 3.

SECTIONS 26, 29 AND 46.

Regina v. The General Medical Council (*Organ's Case*) (*a*), decided 21st January 1861, under these sections, is the first of several valuable decisions, all by the English Courts, upon the duties and powers of the Council as regards the Medical Register and erasure from it. A Mr. Organ had been registered under section 46 of the Act of 1858 as a surgeon in the public service. Allegations were made against him, and the Council erased his name from the Register without hearing him in his defence. On this ground Organ obtained a *mandamus* from the Court of Queen's Bench to restore his name to the Register. The Council at once obeyed, and shortly afterwards, viz., in May 1860, notified Organ of an inquiry which they intended to hold into the allegations. He applied to the Council through his solicitor for leave to appear by counsel. This was refused, and he then attended the inquiry with his solicitor, but declined to take part in it. The Council found the allegations proved, and directed Organ's name to be erased. He thereupon applied again to the Court for a *mandamus* to restore, which was refused. The Court held :—

1. That the power to erase any entry fraudulently or incorrectly made, given by section 26 of the Act of 1858, applies to cases of registration under section 46 as well as to those under section 15 of the Act.

2. That the power of erasure given by section 29 extends to conduct of which the practitioner has been guilty *before* registration.

3. That the Council has the right to refuse to hear counsel on the practitioner's behalf (*b*).

(*a*) See *post*, page 38.

(*b*) A right, however, which the Council does not now exercise, at any rate as regards the hearing of cases under section 29.—See Standing Orders of the Council, Chap. XIV. 9.

SECTION 29.

This section had already been considered in the preceding case, and since then it has come before the Courts on five separate occasions. It is perhaps the most widely known section of the whole Act, for it is that from which the penal jurisdiction of the Council is derived. It is under this section that any registered medical practitioner who has been convicted, or who has after due inquiry been judged guilty of infamous conduct in any professional respect, is liable to have his name erased from the Register. What conduct is to be branded as infamous in a professional respect is a matter for the Council's decision; and with that decision, if given after due inquiry, the Courts will not interfere. The whole responsibility for the exercise of this great disciplinary power rests therefore upon the Council, and it is to be regretted that the power has been defined in so rigid a manner as to leave no intermediate grades of punishment between acquittal and erasure, in dealing with the varying degrees of misconduct which are inquired into. Some mitigation of the consequences of this rigidity has been afforded by a practice, which is not infrequently adopted, in cases where the facts alleged are found to be proved but the offence disclosed is of a minor character. In such a case the Council may postpone its judgment; and thus it affords to the accused practitioner a period of probation, until the next or some following session, when, if his conduct in the interval has been satisfactory, his name is permitted to remain on the Register.

The case of *Ex parte La Mert* (a) (24th November 1863) records the first attempt by a practitioner, whose name had been erased under section 29, to induce the Court to revise a decision of the Council as to what constitutes infamous conduct in a professional respect. The Court of Queen's Bench of four judges unanimously held that with a decision

(a) See *post*, page 81.

of the Council, held after due inquiry, the Court had no power to interfere. This decision was expressly approved by the Court of Appeal in 1889 in the case of *Allbutt v. The Council*, to which reference is next made.

In *Allbutt v. The General Medical Council* (a) (6th July 1889) the plaintiff, whose name had been erased from the Register, sued for a mandamus to restore and for damages for the erasure, and also for an injunction and damages for printing and publishing of him that he had been guilty of infamous conduct. Baron Pollock decided against him on all points, and on appeal the Court of Appeal confirmed the decision, holding that publication by the General Medical Council of the proceedings on an inquiry under section 29, if true, accurate, and *bona fide*, is privileged. "The decision of the Council cannot be reviewed directly, " and this attempt to review it indirectly cannot succeed." The decision in *Ex parte La Mert* was confirmed.

The case of *Leeson v. The General Medical Council* (b), in which, a few months later, viz., on 21st December 1889, the majority of the Court of Appeal confirmed the decision of Mr. Justice North in favour of the Council, raised a fresh question. An inquiry had been held, and the name of the practitioner had been erased for infamous conduct. The complaint had been brought, and the facts had been proved, before the Council by the Medical Defence Union. Two members of the Council were subscribers to and guarantors of the Union, although they were not members of its Council and had taken no part in bringing the complaint; and the practitioner brought an action for an injunction to restrain the Council from erasing his name and from publishing the proceedings, on the twofold ground that what he had done was not infamous, and that two of his judges were subscribers to the Medical Defence Union and as such were biassed. The first claim failed, the point had already been decided twice. On the second claim the majority of the

(a) See *post*, page 117.

(b) See *post*, page 125.

Court (Cotton and Bowen, L.JJ.) held that, as the two members of the Council were not actually or constructively accusers, the decision of the Council was valid ; but Fry, L.J., dissented from this decision ; and Bowen, L.J., while upholding the finding of the Council in this particular case, expressed the hope that in future members of the Council would cease to be subscribers to any society which brought cases before the Council.

About four years after this, in *Allinson v. The Council (a)*, another practitioner endeavoured to impeach a decision of the Council on grounds and in circumstances very similar to those in *Leeson's Case*. One of the members of the Council who attended the inquiry had been a subscriber to and a guarantor of the Medical Defence Union and a vice-president of the Union, and as such was an *ex-officio* member of the committee of the Union which had procured the inquiry into the practitioner's conduct. On being elected a member of the General Medical Council this gentleman had resigned his membership of the Union, but the resignation could not take effect for two months, and within that period the inquiry had taken place. The Court of Appeal on 23rd February 1894, on appeal from Collins, J., unanimously upheld the decision of the latter in favour of the Council. This case is specially noteworthy for a definition of the misconduct indicated in section 29, which was drawn up by the Judges and remains the leading pronouncement on the subject. It is :—

“ If a medical man in the pursuit of his profession has
“ done something with regard to it which will be reasonably
“ regarded as disgraceful or dishonourable by his profes-
“ sional brethren of good repute and competency, then it
“ is open to the General Medical Council, if that be shown,
“ to say that he has been guilty of infamous conduct in
“ a professional respect.”

Since the year 1894 the exercise by the Council of its

(a) See *post*, page 153.

penal powers is not reported to have been called in question, with the one exception of an application for a rule *nisi* for a *mandamus* which was made on 20th June 1900 and was refused, *Ex parte C . . . A . . . B . . . (a)*. A practitioner's name had been erased in respect of a conviction and he had served his sentence. Some question had been raised as to the evidence on which he was convicted not being satisfactory, although the Home Secretary, after consideration, had not remitted any part of the sentence. (This was before the creation of the Court of Criminal Appeal.) After his discharge the practitioner applied to the Divisional Court for a *mandamus* to the Council to hear an application to remove the erasure. The Court refused, holding that the proceedings of the Council had been perfectly regular, and that, although they probably had a discretion to rehear a case, there was no duty upon them to do so, and the Court would not compel them.

SECTIONS 31 AND 32. ACT OF 1886, SECTION 6.

Section 31 of the Act, which remained in force until 1st June 1887, provides that every registered person shall be entitled *according to his qualification* to practise medicine or surgery, or medicine and surgery, and to sue for his fees, &c., authorises any College of Physicians to make a bye-law disentitling any of its fellows or members from suing, and directs that such bye-law may be pleaded as a defence in legal proceedings. The first part of the section has now been replaced by a perfectly general provision (section 6 of the Act of 1886), namely, that every registered medical practitioner shall be entitled to practise medicine surgery and midwifery, and to recover fees, &c., in respect thereof.

Section 32 enacts that after 1st January 1859 no person can recover for any medical or surgical advice or attendance, or for the performance of an operation, or for any medicine which he has both prescribed and supplied, unless he proves.

(a) See *post*, page 188.

upon the trial that he is registered under the Act. By subsequent Acts the date was altered from 1st January 1859 to 1st January 1861.

There have been nine decisions on these sections, and as several of them involve the consideration of more than one section it is convenient to group them together. For the most part the cases occurred shortly after the passing of the Acts, and it is to be feared that the words of Chief Justice Erle in *Turner v. Reynall* are of general application :—" It is clear that the defendant had the consideration, " and he seeks to defeat the claim by reason of the 32nd " section of the Act."

The earliest, *Haffield v. Mackenzie* (a) (19th April 1860), was decided in Ireland. It was held to be sufficient for a person claiming to recover for professional services to prove that he is registered at the date of the trial of the action, and that he need not prove registration at the date when his professional services were rendered.

In *Attorney-General v. The Royal College of Physicians* (b) (decided 1st May 1861), the Society of Apothecaries sought without success to restrain the College from altering its bye-laws so as to permit its Licentiates to supply medicine to their patients. It was claimed by the Society that the Medical Act supported its contention but the Court held that it clearly did not.

The next was *Thistleton v. Frewer* (c) (decided 10th June 1861) which came before the Exchequer Chamber in England. The action was brought by a "mechanical "operative galvanist " on an account for "galvanic operations," and the defence failed because it appeared that the action had been commenced before 1st January 1861, to which date the original time permitted by the Act of 1858 had been extended by subsequent Acts.

In *Wright v. Greenroyd* (d) (decided 21st November

(a) See *post*, page 10.

(c) See *post*, page 66.

(b) See *post*, page 28.

(d) See *post*, page 69.

1861), it was held that the Act had no retrospective operation, and did not therefore affect professional services rendered before 1st January 1859; nor presumably, although the later Acts were not referred to, before 1st January 1861.

In *Turner v. Reynall* (a) (decided 28th April 1863), *Haffield v. Mackenzie* was followed in the English Court of Common Pleas, and it was also decided that the fact of one partner being a surgeon and apothecary and the other a surgeon only was no answer to a joint claim for attendance and medicine. This case is also of interest because of the suggestion that, in the matter of the recovery of fees by a firm, it would suffice if only one member were on the Register.

In *Gibbon v. Budd* (b) (decided 30th April 1863), it was held that a physician registered under the Act could recover fees without a special agreement for remuneration.

In *De La Rosa v. Prieto* (c) (decided 22nd May 1864), it was held that the prohibition of an unregistered practitioner from enforcing payment for professional services and medicines was not confined to cases where the patient is sued; and an unregistered assistant failed in an action against a registered practitioner for medicines supplied to and attendance upon the patients of the latter at his request, although it was held that an unregistered assistant might sue for salary.

In *Leman v. Fletcher* (d) (decided 2nd May 1873), it was held that section 21 of the Apothecaries Act, 1815, had not been repealed by the Medical Act, and that a Member of the Royal College of Surgeons of England, registered only as such and having no further qualification, could not recover fees in a case not requiring surgical treatment.

In *Leman v. Houseley* (e) (decided 20th November 1874), it was held that a medical practitioner registered as

(a) See *post*, page 70.

(b) See *post*, page 75.

(c) See *post*, page 82.

(d) See *post*, page 92.

(e) See *post*, page 95.

M.R.C.S. without further qualification could not recover for medicine, advice, and attendance, in a case not requiring surgical treatment. Subsequently the practitioner obtained his L.S.A., was registered as such, and took proceedings afresh. But it was decided that as he was neither qualified nor registered as an apothecary when the services were rendered he could not recover.

The last case is that of *Howarth v. Brearley* (a), which on 11th June 1887 decided that a registered medical practitioner could not recover for services given and medicine supplied by his unqualified assistant, if he himself had neither seen the patient nor supervised the services rendered.

There is perhaps not much in this group of cases that is of practical interest at the present day. The 6th section of the Act of 1886, entitling every registered medical practitioner to practise medicine, surgery and midwifery and to recover fees, has rendered obsolete *Gibbon v. Budd*, *Leman v. Fletcher*, and *Leman v. Houseley*, and the second point decided in *Turner v. Reynall*. We are, however, reminded that notwithstanding the Acts there seems, *in point of law*, to be nothing to prevent a registered practitioner from practising in partnership with an unregistered man or from employing unqualified assistants to attend and treat his patients. The practical disappearance of the delegation of professional services to an unqualified or unregistered partner or assistant is due to the action of the General Medical Council, who have treated such modes of practice on the part of any registered practitioner as infamous conduct within section 29 of the Act, and have on several occasions punished them by erasure from the Register. Moreover the Council, in order that there may be no misapprehension as to their attitude on this important question, have issued the following warning on the subject.

(a) See *post*, page 112.

NOTICE.

AS TO THE EMPLOYMENT OF UNQUALIFIED PERSONS AS ASSISTANTS OR OTHERWISE.

Resolution adopted by the GENERAL COUNCIL on November 24, 1897:—

“Whereas it has from time to time been made to appear to the GENERAL MEDICAL COUNCIL, that some registered medical practitioners have been in the habit of employing as assistants in connection with their professional practice persons who are not duly qualified or registered under the Medical Acts, and have knowingly allowed such unqualified persons to attend or treat patients in respect of matters requiring professional discretion or skill: and whereas in the opinion of the COUNCIL such a substitution of the services of an unqualified person for those of a registered medical practitioner is in its nature fraudulent and dangerous to the public health: The COUNCIL hereby gives notice that any registered medical practitioner, who is proved to have so employed an unqualified assistant, is liable to be judged as guilty of ‘infamous conduct in a professional respect,’ and to have his name erased from the Medical Register under the 29th section of the Medical Act, 1858.

“Further, in regard to the practice commonly known as ‘covering,’ the COUNCIL gives notice that any registered medical practitioner, who by his presence, countenance, advice, assistance, or co-operation, knowingly enables an unqualified or unregistered person (whether described as an assistant or otherwise) to attend or treat any patient, to procure or issue any medical certificate or certificate of death, or otherwise to engage in medical practice as if the said person were duly qualified and registered, is liable to be judged as guilty of ‘infamous conduct in a professional respect,’ and to have his name erased from the Medical Register, under the said enactment.

“But the foregoing notices do not apply so as to restrict the proper training and instruction of *bona fide* medical students or the legitimate employment of dressers, midwives, dispensers, and surgery attendants, under the immediate personal supervision of registered medical practitioners.”

SECTION 40.

This section makes it an offence, punishable on summary conviction by fine not exceeding £20, for any person wilfully and falsely to pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition or

description implying that he is registered under the Act or is recognised by law as a physician or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary. Numerous prosecutions have been instituted under this section and fifteen cases are reported, between January 1860 and January 1899, in which it has been before the higher Courts. We will first note the point decided in each case, and then endeavour to formulate the general result of judicial interpretation of the section.

In *Ladd v. Gould* (a) (decided 21st January 1860), the respondent, who was not registered, kept a chemist's shop on the door of which were the words:—"Surgeon and "Mechanical Dentist." The magistrates thought that the respondent meant by this—"Surgeon Dentist" and "Mechanical Dentist"—and declined to convict; and the Court of Queen's Bench refused to say that the magistrates had drawn a wrong conclusion. This decision was, of course, many years anterior to the passing of the Dentists Act and the creation of the Dentists Register.

In *Pedgrift v. Chevallier* (b) (decided 28th May 1860), the magistrates convicted on the ground that Pedgrift's name did not appear in the Register, from which they assumed that he was not a surgeon; and that his door plate had the word "Surgeon" upon it, from which they inferred that he pretended that he was a surgeon. But the Court of Common Pleas quashed the conviction on the ground that the prosecution had not shown that Pedgrift was not in practice before the passing of the Act, or that he did not possess a diploma.

In *Ellis v. Kelly* (c) (decided 14th November 1860), the defendant was registered as M.R.C.S.Eng. and held a diploma of the German University of Erlangen permitting him to practise medicine throughout Germany. He called himself Doctor Kelly and his plate was engraved "Dr.

(a) See *post*, page 8.

(b) See *post*, page 18.

(c) See *post*, page 21.

“Kelly.” Evidence was given in proof of the genuineness of the German diploma, and that it could not be purchased for money. The magistrates dismissed the case, holding that Kelly was justified in assuming the title of “Doctor of Medicine,” and on appeal their decision was confirmed on the ground that even assuming that Kelly was not a Doctor of Medicine he had not assumed the title wilfully and falsely.

In *Steele v. Hamilton* (a) (decided 21st November 1860), the defendant had called himself “Surgeon, Boston, U.S.” and “Botanic Surgeon, Boston, U.S.” The magistrate dismissed the case, and the Court dismissed the appeal, apparently upon the ground that the prosecution had failed to show that Hamilton was not a surgeon.

In *Andrews v. Styrap* (b) (decided 7th May 1872, twelve years after *Ellis v. Kelly*), the appellant called himself “M.D.,” and held a diploma of Doctor of Medicine from the University of Philadelphia, U.S.A., which he had purchased without having passed any examination or studied or attended the University. He was not registered. The magistrates convicted, and the Court of Exchequer confirmed the conviction, holding that the appellant knew that his diploma was worthless as an indication of professional skill, and had therefore wilfully and falsely assumed the title. One of the Judges was Baron Bramwell who had taken part in the decision of *Ellis v. Kelly* on which the appellant relied, but who now said: “The matter does not appear to me “now as it appears to have appeared to me then.”

In *Carpenter v. Hamilton* (c) (decided 23rd June 1877), the respondent exhibited in his shop window a diploma of Doctor of Medicine of the Metropolitan Medical College of New York and described himself merely as such. It was held by the magistrate that he had committed no offence under the section and the decision was upheld by the Exchequer Division. “How,” asked Baron Cleasby, “is it

(a) See *post*, page 26.

(b) See *post*, page 87.

(c) See *post*, page 100.

“ possible to make out a charge of falsely pretending to be something, when the only evidence is that the man pretends to be what he really is ? ”

In **Davies v. Makuna** (a) (decided 22nd April 1885), it was held in the Court of first instance by Pearson, J., that the wilful and false pretending of the section must be in such manner as to deceive the public and that it did not apply as between two individuals in partnership together. The case went to the Court of Appeal, where the matter in issue between the litigants was held to be concluded by the provisions of the Apothecaries Act, 1815, with the consequence that section 40 was not judicially considered by the higher Court.

In **Regina v. Baker** (b) (decided 3rd December 1891), Samuel Edwin Lambert Smith, who was registered before the Medical Act of 1886 as a licentiate of the Society of Apothecaries, had been in the habit of signing vaccination and other certificates as M.D., although he held only a diploma of Doctor of Medicine of the Beach Medical Institute, Indianapolis, U.S.A., which was not a registrable qualification. He was convicted and on appeal to the Queen's Bench Division the conviction was confirmed.

In **Steel v. Ormsby** (c) (decided 10th May 1894), the appellant was unregistered, and held merely a Certificate of the General Council of Safe Medicine awarding him the degree of M.D., B.C. (i.e. Botanic College). He signed death and other certificates as “ M.D., B.C.” He was, in fact, a working collier. The magistrate found on the evidence that the appellant had wilfully and falsely described himself as M.D., and convicted, and the Divisional Court upheld the conviction.

Regina v. Ferdinand (d) was a case decided at the County of London Sessions on 13th January 1896, on appeal from the conviction of a Metropolitan stipendiary magistrate.

(a) See *post*, page 103.

(c) See *post*, page 165.

(b) See *post*, page 143.

(d) See *post*, page 168.

Appellant held a diploma issued by the University of Philadelphia, and signed M.D., U.S.A., after his name, but he had no registrable qualification. The conviction was affirmed; the Chairman (Sir Peter Edlin) saying that the addition of the letters "U.S.A." was no justification.

In **Regina v. Lewis and Frickhart** (a) (decided 19th May 1896), the defendant, whose name had been erased from the Medical Register on 23rd May 1894 for infamous conduct in a professional respect, and from the Roll of Licentiates of the Royal College of Physicians of Ireland, but who still held the degree of M.D. of the University of Zurich, had been summoned for signing a certificate on 20th December 1895 with the letters "M.D." The magistrate on the facts dismissed the case, and the Divisional Court confirmed the magistrate's decision, holding there was no proof of wilful and false pretence.

In **Regina v. Lewis and Bridgwater** (b) (decided at the same time), the defendant announced himself on hand-bills and on his window blinds as "M.D., U.S.A." and kept displayed in his consulting room a diploma of an American University. This summons the magistrate also dismissed, deciding on the facts that defendant in describing himself as "M.D., U.S.A." had not held himself out as a registered M.D. The Divisional Court again upheld the magistrate's decision.

In **Eastburn v. Robertson** (c) (decided 16th November 1898), the defendant had been convicted by the Sheriff-substitute, on the complaint of the Registrar of the Branch Council for Scotland, of wilfully and falsely taking and using the title or addition of "A.M.S.," implying that he was recognised by law as a practitioner in medicine, in contravention of the section. What the letters were meant to indicate was not proved or known, but the defendant had called himself, among other things, an "American eclectic medical specialist." The Court of Justiciary suspended the

(a) See *post*, page 170.

(b) See *post*, page 170.

(c) See *post*, page 173.

conviction on the grounds that the complaint was irrelevant and that the offence for which the defendant was convicted had not been charged against him.

In *Hunter v. Clare* (a) (decided 24th January 1899), the defendant, who was registered only as L.S.A., was held by the Divisional Court not to be entitled to describe himself as a physician notwithstanding the fact that he was, unlike the practitioner in *Regina v. Baker*, registered under the Medical Act of 1886 and was therefore entitled to practise medicine, surgery and midwifery; but it was also held that such description had not been adopted by him wilfully as well as falsely and that consequently he could not be convicted. In connection with this decision it should be noted that the Apothecaries Act of 1907 has since empowered the Society of Apothecaries of London to grant diplomas conferring the qualification of Licentiate in Medicine and Surgery.

A study of this array of decisions reveals some inconsistencies, and also shows that it has not always been easy to obtain a conviction under the section. It is probable that, while registrable qualifications have increased, the number of institutions granting bogus diplomas, or diplomas without any qualifying examination, has decreased; and that consequently we may expect the section to be invoked in the future less than it has been in the past, though it will always be of great importance.

How, then, has the section been interpreted by these decisions? The act complained of must, to secure a conviction, be shown to have been done wilfully *and* falsely. It was held essential in the earlier cases, when the Act was still very recent, for the prosecution to prove either that the person charged had not been in practice before the passing of the Act (2nd August 1858) or that he possessed no diploma (*Pedgrift v. Chevallier*; *Steele v. Hamilton*); and presumably proof of the latter fact would still be required

(a) See *post*, page 184.

in certain cases. But the cases, and there are several, in which the accused person held a diploma which was unregistrable, are not easy to reconcile. *Kelly* possessed a diploma obtained, after examination, from a German university of repute. He was not convicted, although one of his judges, Baron Bramwell, stated in a later case that he had changed his view. *Andrews*, with a diploma purchased without examination from the University of Philadelphia, was convicted; as was *Smith*, with a diploma of the Beach Medical Institute of Indianapolis. Each had styled himself "M.D." *Ferdinand*, holding the Philadelphia diploma, and calling himself "M.D., U.S.A.," was convicted at the County of London Sessions; but the Divisional Court refused to convict *Bridgwater*, who exhibited what appeared to be the diploma of an American university and also called himself "M.D., U.S.A.," thereby in effect overruling that decision. *Steel*, a working collier, called himself "M.D., B.C." (i.e. Botanic College) and held a certificate to that effect, but was convicted; *Hamilton* who was, and who called himself, "Doctor of Medicine of the Metropolitan Medical College of New York" was acquitted, on the ground that he had only pretended to be what he really was. To treat these decisions as entirely consistent with each other is evidently not easy; but it is submitted that the general result of them is this:—If the practitioner has used after his name letters which suggest a registrable diploma which he does not possess he will be convicted; but if, in describing his diploma, he uses letters which indicate that it is not registrable he has not committed an offence under section 40 unless it is a diploma of an obviously bogus concern such as the Botanic College, [or an obviously incorrect or impossible description such as M.D., U.S.A.]. The bracketed words are, it is true, not borne out by *Bridgwater's* case and are indeed inconsistent with it. But that decision is now sixteen years old, and it is thought probable that at the present day such a description would be recognised as being as

wilfully false as, say, " M.D., United Kingdom " or " M.D., " Switzerland."

SECTIONS 40, 42.

In the case of *Clarke v. M'Guire* (a) it was decided on 2nd December 1908 by the Court of King's Bench in Ireland that a prosecution under the Medical Act of 1858 can be instituted by a private person, and that the right to do so is not confined to the General Medical Council. The prosecution was under section 40, and the ground of the decision was that an offence under that section is one against the public generally and not against a particular individual only, notwithstanding that section 42 awards to the General Medical Council any penalties recovered. As already mentioned on page xvi, section 26 of the Medical Act of 1886 has repealed the provision in section 4 of the Dentists Act which prohibited (except with the consent of the General Council, or a branch Council) prosecutions under section 3 of that Act by a private person.

ACT OF 1886, SECTIONS 2 AND 3.

In *Attorney-General v. The Apothecaries' Hall of Ireland* (b) decided in Ireland on 3rd March 1888, the King's and Queen's College of Physicians in Ireland applied for an injunction to restrain the Apothecaries' Hall of Ireland and the Royal College of Surgeons in Ireland from holding joint examinations under this Act, then recently passed. The King's and Queen's College contended that the curriculum of the Apothecaries' Hall was not of such a character as to constitute it a medical corporation within the meaning of section 3 (1) (b); but the Vice-Chancellor refused to grant an injunction, holding that the Apothecaries' Hall was capable of granting a diploma in medicine, and that the General Medical Council would see to the maintenance of

(a) See *post*, page 189.

(b) See *post*, page 116.

its standard of proficiency, appealing thereon if necessary to the Privy Council.

In *The Royal College of Physicians v. The General Medical Council* (a) a similar question was, on 8th March 1893, decided in England. The object of the action was to determine whether at the passing of the Medical Act of 1886 the Royal College of Physicians of London was a medical corporation within the meaning of section 3 (1) (a) of the Act. The action was tried in the Chancery Division before Stirling, J., who decided it in favour of the Royal College of Physicians.

II. THE DENTISTS ACT

This Statute came into force on 1st August 1879, but the first reported decision upon it was not until just eight years later. This decision was under section 11, and also under section 13, which is the clause in the Dentists Act which gives the Council the power of erasure from the Register, and corresponds to, though it is by no means identical with, the 29th section of the Medical Act of 1858. The antagonist of the Council in this litigation, one Partridge, maintained his attack for several years, and through his pertinacity added three decisions of some importance to our law reports before he finally gave up the struggle. All three cases relate to the Council's power of erasure, and we will begin with them.

SECTIONS 11, 13.

The first, *Ex parte Partridge* (b), was decided on 1st August 1887. Partridge had obtained the diploma in dentistry from the Royal College of Surgeons in Ireland and had registered as a Licentiate. The College cancelled his diploma on the ground that he had advertised in breach of

(a) See *post*, page 147.

(b) See *post*, page 194.

his undertaking, given when his diploma was granted, that he would not do so. On receiving notice of the cancellation the General Medical Council, conceiving that they had power under section 11, erased his name from the Dentists Register without further inquiry. The Divisional Court granted a *mandamus* directing the Council to restore the name; and the Council appealed to the Court of Appeal, who however held that under the Dentists Act—in this respect differing from the Medical Acts—the Council had not the power to direct erasure except after an inquiry under section 13 of the Act.

Partridge thereupon brought an action against the Council for damages for the wrongful erasure—**Partridge v. The General Medical Council (a)**. This action was tried by Baron Huddleston, who dismissed it; and his decision was confirmed by the Court of Appeal on 5th May 1890. The Court held that the duty imposed upon the Council in respect of erasure of a name was judicial, and not merely ministerial, and that no action could be maintained against the Council without proof of malice. Baron Huddleston had found that no malice was proved, and the Master of the Rolls said he could hardly conceive how there could be any malice in the Council towards the practitioner.

Meanwhile the Council, having restored Partridge's name to the Register, had held an inquiry and had erased it a second time. On this Partridge brought another action against the Council and their Registrar—**Partridge v. The General Medical Council and Miller (b)**—for a *mandamus* to compel the restoration of his name and qualification to the Register, and he also claimed damages for wrongful erasure. This action was tried in the Queen's Bench Division before Mr. Justice Denman and a special jury on 9th February 1892, when the judge ruled that there was no evidence to go to the jury and nonsuited the plaintiff;

(a) See *post*, page 198.

(b) See *post*, page 202.

and on an application by him for judgment in his favour or a new trial the Court of Appeal unanimously confirmed the decision of Mr. Justice Denman, holding that no *mandamus* would go unless it could be shown that there was no evidence on which the Council could have reasonably acted. Partridge had raised *inter alia* the contention that the decision of the Council was invalid because the representative on the Council of the Royal College of Surgeons in Ireland, the body which had cancelled his diploma, had as a member of the General Medical Council sat upon the inquiry. In examining and rejecting this contention the Court of Appeal approved of and confirmed the rule of law which had been already laid down in *Leeson's Case*, see *ante*, page xxi.

No other decision on the 13th section has been reported.

SECTION 3.

By far the most important group of cases decided under the Dentists Act is that under section 3. They are twelve in number, and relate to dental companies as well as to individual practitioners. Each of the three Kingdoms is represented in these twelve decisions ; Scotland contributes one—the only reported decision from the higher Courts of that country under the Dentists Act—Ireland contributes five, and England the rest. It is perhaps not surprising to find some diversity of judicial opinion manifesting itself.

The earliest is *Emslie v. Paterson (a)*, decided by the Court of Justiciary on 12th June 1897. Emslie was an unregistered person practising in Edinburgh, and he was prosecuted on four charges, namely :—(1) for displaying a plate on his premises bearing the words : “ American Dentistry. A. Emslie ” ; (2) in respect of another plate bearing the words “ Dental Office ” ; (3) for using business cards or advertisements bearing the words :—“ American

(a) See *post*, page 217.

“Dentistry—Persons desirous of having dental work done
“will do well to call at our Office and save at least 50%—
“A. Emslie, Manager”; and (4) for exhibiting a diploma of
the Dental Society of New York conferring upon him the
Degree of Master in Dental Surgery. The third and fourth
charges were dismissed by the Sheriff-substitute on the
ground that the complaints were not sufficiently localised;
but he convicted on the first and second charges.

Emslie appealed to the Court of Justiciary, and the
conviction was quashed. Lord Moncrieff held that the plates
and notices contained no profession of the qualifications of
Emslie, although his Lordship hinted that he might have
been convicted in respect of the diploma had the charge
been differently framed. The Lord Justice-Clerk said:
“If the appellant can without any breach of the criminal
“law extract teeth or put in false teeth or the like I can see
“nothing in the Statute forbidding him from announcing
“that he does so, which is just announcing that he practises
“dentistry.”

In **Brown v. Whitlock** (a), decided 26th May 1903 by
the King's Bench Division in England, Whitlock, an unre-
gistered person, had purchased a practice from the personal
representative of one Stent, a registered practitioner. On
the front railings was a marble slab with the words
“Mr. W. Lawson Whitlock, 10 to 5”; at the front and side
doors were the words:—“Mr. C. R. Stent, R.D.S. (England),
“Surgeon Dentist,” and there were other similar notices
in Stent's name. The magistrate decided on the facts that
Whitlock had not done anything implying that he was
registered under the Act or specially qualified to practise
dentistry, and dismissed the charge. The Divisional Court
held with reluctance that they could not interfere with the
magistrate's decision on the question of fact, Lord Alver-
stone, L.C.J., intimating that in his opinion Whitlock
had kept up the notices in order to identify himself with

(a) See *post*, page 223.

Stent, but that that was not the basis of the charge against him.

In *O'Duffy v. Jaffe, Surgeon Dentists, Limited (a)*, decided 20th November 1903 in Ireland, it was held that "person" in section 3 must be confined to natural persons and does not extend to corporations and companies. Lord O'Brien, L.C.J., in his judgment pointed out that the provisions of the Act as to registration and erasure from the Register, and as to examinations, &c., could only apply to natural persons and held that the company could not be convicted. This decision, though binding upon them, does not appear altogether to have commended itself to the Irish Judges in subsequent cases.

Rex v. Registrar of Joint Stock Companies (b) was decided in Ireland on 20th April 1904. The Board of Trade, perhaps owing to the decision last mentioned, issued general directions as to dental companies to the Registrar of Joint Stock Companies, and on application being made by a number of persons, comprising a "mechanical dentist" and others, none of whom was on the Dentists Register, to register a company under the title of "S. G. Rowell, Dentist, Limited" the Registrar in Dublin referred the question to the Board of Trade. On an application by Rowell for a *mandamus* directing the Registrar to register the company it was held, without expressing any opinion on *O'Duffy v. Jaffe*, that the Dentists Act implied a statutory definition of the word "dentist" as "dentist registered under the Dentists Act," that the title of the proposed company involved false representations and fraud on the public, and therefore that a *mandamus* would not be granted.

In *Panhans v. Brown (c)*, decided on 13th May 1904 by the English Divisional Court, the appellant, an unregistered man, exhibited on the door plate of his premises the words "The West Central Dental Institute Limited," and

(a) See *post*, page 228.

(b) See *post*, page 231.

(c) See *post*, page 239.

signed receipts for money in the name of this company, adding his initials as managing director. His own name nowhere appeared, but the company had been formed by him, and there was evidence that he practised dentistry at the address. The Magistrate held that he brought himself within section 3 and convicted. The Divisional Court upheld the conviction, holding that there was abundant description to infringe the Act.

In *Attorney-General v. Mr. Appleton, Surgeon Dentist, Limited (a)*, decided 15th February 1905, in Ireland, a company had been registered under this title, but neither the managing director, Frederick Appleton, nor any of the signatories, was a dentist, nor was the business carried on by dentists. On an application to the Chancery Division it was held that, notwithstanding remedies which might otherwise exist (e.g. by prosecution), the Court had jurisdiction to grant the injunction, and the company was restrained from carrying on business under its registered name or any other implying that the business was carried on by persons registered under the Act.

In *Attorney-General v. Myddleton's Limited (b)*, decided in Ireland on 13th June 1907, a company had been registered under this title by Alfred Myddleton and six other persons with the object of carrying on the business of surgeon dentists by means of "properly qualified persons," and the company had extensively advertised themselves as dentists. There was an agreement between Alfred Myddleton as vendor and a trustee for the company, under which Myddleton had sold the goodwill of his business of "teeth specialist and the adapting and fitting of artificial teeth," and had acquired all but seven of the shares of the company, and he was one of the directors and the manager and secretary of the company. Neither Myddleton nor any of the shareholders or directors was registered, although in the annual return made by the company under the Companies

(a) See *post*, page 252.

(b) See *post*, page 257.

Acts he was described as “dentist.” An injunction was granted restraining the company, its directors and members, from employing Myddleton under the title of dentist and from representing that he was a dentist, or that the company comprised or employed persons of the name of Myddleton who were dentists.

On 14th October 1908 was given the well-known judgment of the English Divisional Court in **Barnes v. Brown** (a). Barnes, an unregistered practitioner, had the following notice on his premises visible from the street: “H. J. Barnes—Finest artificial teeth at moderate prices—Extractions—Advice free—Hours 10 to 7—English and American teeth—Advice free—Painless Extractions.” There was evidence that he had performed a dental operation, but no evidence that he had taken or used the name of dentist or dental practitioner, nor was his personal skill in question. Barnes was convicted as having held himself out as a person specially qualified to practise dentistry, and the Divisional Court, consisting of Lord Alverstone, L.C.J., Bigham, J., and Walton, J., dismissed his appeal from the conviction.

Next came another company case:—**Attorney-General v. George C. Smith, Limited** (b), decided on 23rd January 1909 in the Chancery Division in England. Smith had been struck off the Dentists Register in 1906, and had subsequently registered this company to take over the profession or business of dentists and makers of artificial teeth carried on by him at Lewisham and elsewhere. Smith was the only director of the company. An injunction was granted to restrain the company from carrying on such business.

In **Byrne v. Rogers** (c), decided in the King’s Bench Division in Ireland on 18th January 1910, Byrne, an unregistered practitioner, had advertised as “The World’s

(a) See *post*, page 295.

(b) See *post*, page 302.

(c) See *post*, page 305.

“Expert Adaptor of Teeth”—“Extractions by my own “Special System”—“He tenders you original advice on “the treatment acquired by his vast experience of twenty-five years abroad,” &c., &c. There was also some evidence that he had orally called himself a dentist. He was convicted by the magistrate. The Lord Chief Justice, in a full judgment reviewing the previous decisions on the subject, held that the words “specially qualified” were confined to qualification by hall-mark, licence, or diploma. He dissented from *Barnes v. Brown*, accepted the decision of the Court of Appeal in *Bellerby v. Heyworth* (see below), and allowed the appeal, but without costs. Wright, J., and Dodd, J., concurred.

This brings us to the case—latest and most important of all—of *Bellerby v. Heyworth* (a), decided by the House of Lords on 15th April 1910. This was an action brought in England in the Chancery Division, and was in form a dispute between the three partners, none of whom was registered, of the firm of Bellerby Heyworth & Bowen, who were in business as extractors and adaptors of teeth. Heyworth had put up the following notice:—“Bellerby Heyworth & Bowen—Finest Artificial Teeth—Painless Extractions—“Advice free—Mr. Heyworth attends here.” There was a clause in the partnership articles providing that anything done by any of the partners in contravention of the Dentists Act should be ground for dissolution of partnership. Bellerby claimed that this notice was a contravention and took proceedings for dissolution. Parker, J., in the Chancery Division, upon the authority of *Barnes v. Brown*, held that there had been a breach of the partnership articles. The Court of Appeal reversed this decision, thereby overruling *Barnes v. Brown* and approving *Emslie v. Paterson*. The case went to the House of Lords, which confirmed the decision of the Court of Appeal.

Closely following *Bellerby v. Heyworth* there ran

(a) See *post*, page 313.

through the Courts the case of *Minter v. Snow* (a). In this case the announcement was as follows:—"English and American Dentistry—Painless Extractions—Consultations and Advice free—Minter & Snow, Dental Institute, No. 213 Richmond Road, Twickenham—Hours 9 A.M. to 8 P.M." It will be observed that the very words "Dental Institute" which resulted in a conviction in *Panhans v. Brown* occurred here. The case, which came before the Lords on the same day as *Bellerby v. Heyworth*, was treated as governed by it, and decided accordingly.

In the decisions on this section which have involved limited liability companies it is gratifying to note how the Courts, both in England and in Ireland, have resisted every attempt to evade the provisions of the section by having recourse to the Companies Acts, and how the Judges have not been sparing in their denunciation of the deception which the promoters of these one-man concerns have attempted to practise on the public. When, however, we turn to the remaining cases which relate to individuals, we find a less satisfactory condition of affairs.

The decision of the House of Lords in *Bellerby v. Heyworth* is thus summarised in the head-note to the report printed in the present volume:—

"The words 'specially qualified to practise dentistry' in section 3 of the Dentists Act, 1878, import a professional qualification entitling the holder to registration under the Act, and not merely professional skill or competence. There is nothing in the Act which prevents any man from doing dentist's work and informing the public that he does such work without being registered under the Act."

This is the statement of the law by the Supreme Court of Appeal of the United Kingdom, and it is unalterable except by Act of Parliament. To those who appreciate what the creation of a Profession stands for—and the aim

(a) See *post*, page 327.

of the Dentists Act was to create the Profession of Dentistry—and who realise the immense progress which dental science has made in recent years and its vital importance to the health of the people, the construction which the House of Lords has felt compelled to place on the third section of the Act must indeed be cause for discouragement. Nor is there even the slight consolation of knowing that the case was strenuously fought—as *Barnes v. Brown* was—by those representing the Profession. The litigation was between three partners, all of them unregistered men. “I ought “to say,” said counsel in opening the appeal in the House of Lords, “that this action is a friendly action, in this “sense—that it was brought in the Chancery Division for “the purpose of obtaining a review of a decision in the “Divisional Court in the case of *Barnes v. Brown*. The “parties, who were interested in that decision of a question “which involves a very large class of persons, are anxious that “that decision may be reviewed. It was impossible to appeal “from that decision because it was a decision of the Divisional “Court affirming a conviction by a police magistrate, and “this action was commenced” (a). In *Barnes v. Brown*, as in the cases decided under a very similar section of the Veterinary Surgeons Act (b), the English Divisional Court seems to have been conscious of the evils at which the Act was aimed, and to have considered the section from that point of view; whereas the Scottish and Irish Courts, the English Court of Appeal, and the House of Lords all lay stress upon the fact that the Act nowhere expressly forbids the practice of dentistry by unqualified persons, regard such practice as consequently lawful, and construe the section so as not to prejudice the unqualified man. A distinction is drawn, to the great disadvantage of the Profession, between what a man says he *is* and what a man says he *does*. And so

(a) *British Dental Journal*, Vol. xxxi. page 422.

(b) See Note on this section and the decisions thereunder, *post*, page 333.

is brought about the following situation in which the patient, no less than the dentist, is assumed to be able to distinguish between the registered and the unregistered man. The latter may not say "I am a Dentist," or "I am a Dental Practitioner," nor may he imply "by name, title, addition or description" that he is on the Register, because the Act expressly forbids him. But he may say "I practise dentistry"; he may, although devoid of professional training, expatiate upon his skill in dentistry; and he may, being outside professional practice and ethics, employ any number of ignorant and unqualified assistants and have recourse to flaring and unscrupulous advertising, and thereby not only delude the public but practically destroy his professional neighbour, the registered man, who cannot retaliate in kind without the almost certain prospect of sooner or later being summoned before the General Medical Council to answer a charge of "infamous or disgraceful conduct in a professional respect" (a).

SECTION 5.

The 5th section of the Act prohibits any person from recovering in any Court any fee or charge "for the performance of any dental operation or for any dental attendance or advice" unless he is on either the Dentists or the Medical Register.

In *Hennan and Co., Limited v. Duckworth* (b), decided on 18th April 1904, the Divisional Court held that an unregistered person might recover the price of a set of teeth

(a) On 20th May 1894 the Council adopted the following resolution: "That the attention of the COUNCIL having been called to the practice of advertising by certain dentists, it is hereby resolved: 'That the issue of advertisements of an objectionable character, and especially of such as contain either claims of superiority over other practitioners, or depreciation of them, may easily be carried so far as to constitute infamous or disgraceful conduct in a professional respect.'"

(b) See *post*, page 234.

which he had supplied, but not a charge for fitting the teeth.

The case of *Seymour v. Pickett* (a), decided by the Court of Appeal on 25th February 1905, went rather further in favour of the unregistered person. The Court held that the section merely prevents the recovery by action of the fees and charges to which it refers, and does not make illegal any contract entered into concerning them. The plaintiff, an unregistered man, had rendered an account of services partly within and partly outside the scope of section 5. The defendant had paid a cheque generally on account, and had then given a second cheque, payment of which he stopped. On being sued, defendant relied on section 5 as a defence; but it was held that the plaintiff might appropriate the first payment in respect of the services for which he could not sue, and maintain an action for that part of his account which was for mechanical work and materials.

SECTIONS 7, 37.

Regina v. General Medical Council (*Spero's Case*) (b) was decided 1st June 1897. Mr. Spero was at the passing of the Act an articulated pupil. His articles expired in October 1878 but he did not apply to be registered until 1888; and it was held that he had not complied with the requirements of section 7 because he had failed to transmit to the Registrar before 1st August 1879 his name and address in a statutory declaration similar to that scheduled to the Act.

The remaining decisions on the Dentists Act are a group of three—*Hill v. Clifford*, *Clifford v. Timms*, and *Clifford v. Phillips* (c), which involved the same questions. They were all tried before Mr. Justice Warrington in the Chancery

(a) See *post*, page 243.

(b) See *post*, page 212.

(c) See *post*, page 264.

Division, all three went to the Court of Appeal, and two of them eventually reached the House of Lords in November 1907.

The litigation took the form of actions between partners (who had all been registered dentists) arising out of notices which had been given to certain of the partners by the others intimating dissolution of the partnerships. The articles of partnership provided that if any partner should be guilty of professional misconduct, or of any act calculated to injure the partnership business, the other partners might dissolve the partnership by notice in writing. The names of certain of the partners having been erased from the Dentists Register the remaining partners gave notices in writing that the partnerships were dissolved (*a*).

The reports of the cases are lengthy but the results may be stated very shortly. Three points of some importance were the subject of judicial decision.

First, it was claimed that the order of erasure of the General Medical Council was not admissible at the trial in the High Court as evidence of the conduct which resulted in erasure. The Court of Appeal held that the order was admissible as *prima facie* evidence thereof and that as no rebutting evidence had been given the statutory misconduct was proved.

Secondly, the Court of Appeal held, reversing the decision of Warrington, J., in the Court below, that no distinction could be drawn between conduct which was disgraceful in a professional respect and professional misconduct within the meaning of the articles of partnership.

Thirdly, it was held by the House of Lords, that the publication by a dentist of statements expressed in terms of profuse self-praise, and of disparagement of other practitioners, constituted professional misconduct such as to justify the giving of the notices.

(*a*) The names which had been erased were restored to the Register by the Council on 28th November 1911.

In giving judgment in *Clifford v. Timms* Mr. Justice Warrington said that he was not aware that the employment of unregistered assistants was contrary to any rule of professional conduct (see *post*, page 268). The Judge's attention had apparently not been drawn to the warning notice which the Council had issued on this subject more than fourteen years before. It is as follows :—

AS TO THE EMPLOYMENT OF UNQUALIFIED PERSONS AS ASSISTANTS OR OTHERWISE.

Resolution adopted by the GENERAL COUNCIL on November 24, 1892 :—

“ Any registered dentist practising for gain, who knowingly and wilfully deposes a person not registered or qualified to be registered under the Dentists Act to treat professionally on his behalf in any matter requiring professional discretion or skill any person requiring operations in dentistry of a surgical character, will be liable to be dealt with by the GENERAL MEDICAL COUNCIL as having been guilty of infamous or disgraceful conduct in a professional respect, and to have his name erased from the Dentists Register.”

In the pages that follow are given, first, the names of the medical decisions in alphabetical order and an indication of the point decided in each, then a similar list of the dental decisions ; and, after this, the reprints of the actual cases. It has seemed convenient to add some notes on the statutes which particularly relate to Apothecaries, Pharmacy, Midwives, and Veterinary Surgeons, and on some cases under them, cited and relied on in several of the decisions. The book closes with a reprint of all the sections of the Medical Acts and the Dentists Act which have been considered or referred to.

THE DECISIONS

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ABBREVIATIONS

A. C. (with date)	Law Reports, Appeal Cases, House of Lords.
B. & S.	Best & Smith's Reports.
C. B. (N.S.)	Common Bench Reports, New Series.
Ch. D.	Law Reports, Chancery Division.
Ch. (with date)	Law Reports, Chancery Division, from 1891.
Cox, C. C.	Cox's Criminal Law Cases.
E. & E.	Ellis & Ellis's Reports.
H. & C.	Hurlstone and Coltman's Reports.
H. & N.	Hurlstone and Norman's Reports.
I. C. L. R.	Irish Common Law Reports.
I. L. T.	Irish Law Times.
I. R. (with date)	Irish Reports.
Ir. Jur.	Irish Jurist.
J. & H.	Johnson & Hemming's Reports.
J. P.	Justice of the Peace.
Jur. (N.S.)	Jurist Reports, New Series.
K. B. (with date)	Law Reports, King's Bench Division.
L. J. (C. P.)	Law Journal, Common Pleas.
L. J. (Ch.)	Law Journal, Chancery.
L. J. (Ex.)	Law Journal, Exchequer.
L. J. (K. B.)	Law Journal, King's Bench.
L. J. (M. C.)	Law Journal, Magistrates' Cases.
L. J. (P.)	Law Journal, Probate.
L. J. (Q. B.)	Law Journal, Queen's Bench.
L. R. (Ir.)	Law Reports, Ireland.
L. R. (Q. B.)	Law Reports, Queen's Bench.
L. T.	Law Times Reports.
N. I. J. R.	New Irish Jurist Reports.
Q. B. D.	Law Reports, Queen's Bench Division, 1875-1890.
Q. B. (with date)	Law Reports, Queen's Bench Division, 1891-1901.
R.	The Reports, 1893-1895.
Sol. Jo.	Solicitors' Journal.
T. L. R.	Times Law Reports.
W. R.	Weekly Reporter.

THE DECISIONS

NOTE

UNDER the name of each Decision is placed the date on which judgment in the case was given, followed—bracketed in heavier type—by the reference to the report of the case which has been reprinted in this volume.

If a Decision has been reported in more than one series of Reports the references to the other reports are added.

The references to the Decisions, or to any matters directly connected with them, in the annual volumes of the Minutes of the General Medical Council are also noted.

THE MEDICAL DECISIONS

REGINA v. STORRAR

1859. June 15.

[28 L. J. (Q. B.) 326]

Medicine and Surgery—General Council of Medical Education and Registration—Member thereof chosen by the University of London—By whom to be chosen—21 & 22 Vict. c. 90.

By the 21 & 22 Vict. c. 90, s. 4, the General Council of Medical Education and Registration is to consist of one person chosen from time to time by each of the several bodies therein named, and, amongst them, by the University of London:—Held, that the authority to choose such member is vested in the Senate, consisting of the Chancellor, Vice-Chancellor and Fellows for the time being, and not in the whole body of graduates of the University.

This was an information in the nature of a *quo warranto*, against the defendant, for exercising and usurping the office and franchise of a member of the General Council of Medical Education.

The defendant pleaded that he was duly elected, and issue was joined thereon.

A SPECIAL CASE was stated, by order of CROMPTON, J., for the opinion of this Court.

By the 21 & 22 Vict. c. 90, intituled "An Act to regulate the qualifications of practitioners in medicine and surgery," it was enacted, amongst other things, that a council, which should be styled "The General Council of Medical Education and Registration of the United Kingdom" thereafter referred to as the "General Council" should be established, and that the General Council should consist of one person chosen from time to time by each of the following bodies, that is to say, the Royal College of Physicians, the Royal College of Surgeons of England, the Apothecaries Society of London, the University of Oxford, the University of Cambridge, the University of Durham, the University of London and divers other bodies therein named, eighteen in all, and of six persons to be nominated by Her Majesty with the advice of her Privy Council, and of a president to be

elected by the General Council; and that the said General Council should hold their first meeting within three months from the commencement of the said Act, and such was accordingly duly held, on the 23rd of November 1858, at the Hall of the Royal College of Physicians.

On the 3rd of November 1858, the Chancellor, Vice-Chancellor and Fellows of the University of London, then being and acting as the Senate of the said University, in alleged pursuance of the said statute, proceeded to elect a member of the said General Council, and then elected the defendant, John Storrar, as the person to be, in pursuance of the said statute, elected by the University of London as a member of the said General Council, and he, the defendant, attended at the meeting of the said General Council on the 23rd of November 1858, and voted, and has since at other meetings of the General Council attended and voted, and still claims to attend and vote as the person elected in pursuance of the said statute, by the University of London.

The University of London was first constituted and regulated by a royal charter of His late Majesty King William the Fourth dated the 28th of November in the seventh year of His said Majesty's reign, and by it certain persons therein named, and all other persons whom His said Majesty might thereafter appoint to be Chancellor, Vice-Chancellor or Fellows of the said University were by him declared and constituted one body politic and corporate by the name of the 'University of London' and that charter was accepted and acted upon by such persons.

This charter was, by a royal charter of Her present Majesty bearing date the 5th of December in the first year of her reign, revoked, and Her said Majesty did, by her said charter, grant, declare and constitute certain persons therein mentioned, and all the persons who might thereafter be appointed to be Chancellor or Fellows, one body politic or corporate, by the name of the "University of London," with certain powers, which powers Her said Majesty did thereafter, by her royal charter, bearing date the 7th of July in the thirteenth year of her reign, enlarge, which charters were accepted and acted upon by the persons therein mentioned. These last-mentioned charters were, by a royal charter of Her present Majesty, bearing date the 9th of April in the twenty-first year of her reign, duly revoked and by the last-mentioned charter Her said Majesty did grant, declare and constitute certain persons therein mentioned, and all persons who might thereafter be appointed to be Chancellor or Fellows of the said University as therein mentioned, and all the persons on whom respectively the University created by the said charter of the 5th of December in the first year of her reign,

had conferred any of the degrees of Doctor of Laws, Doctor of Medicine, Master of Arts, Bachelor of Laws, Bachelor of Medicine, or Bachelor of Arts, and all the persons on whom respectively the University created by the said charter of the 9th of April might thereafter confer any of the said degrees, one body politic and corporate by the name of the University of London, which charter was accepted by the said persons, and acted on by them; and Her Majesty did by her said charter further will and ordain, amongst other things, that the said body politic and corporate should consist of a Chancellor, Vice-Chancellor, Fellows and Graduates, and that there should be thirty-six Fellows, exclusive of the Chancellor and Vice-Chancellor for the time being, and that the Fellows should be such persons as Her Majesty did thereby appoint, or as she, her heirs and successors, should from time to time appoint, as Fellows under her or their sign manual, and as should be appointed as Fellows under the power thereafter and hereinafter contained, and that the graduates should be the persons on whom respectively the said University should confer any of the said degrees, and did further will and ordain that the Chancellor, Vice-Chancellor and Fellows for the time being should constitute the Senate of the said University, and that every second vacancy amongst the Fellows should be filled up by Her Majesty from a list of three persons to be nominated by the Convocation of the said University, until nine of the Fellows should have been so selected; and that thereafter one out of every four new Fellows should be so selected, and that the Convocation should consist of all Graduates for the time being of the said University, except Bachelors of Laws and Medicine, of less than two years', and except Bachelors of Arts of less than three years' standing, and that the Chancellor, Vice-Chancellor and Fellows for the time being, should have the entire management of and superintendence over the affairs, concerns and property of the said University, and that in all cases unprovided for by the charter, it should be lawful for the Chancellor, Vice-Chancellor and Fellows to act in such manner as should appear to them best calculated to promote the purposes intended by the University, and that the said Chancellor, Vice-Chancellor and Fellows should have full power from time to time to make and alter any bye-laws and regulations, so as the same were not repugnant to the laws of the realm, or to the general objects and provisions of the said charter touching examinations for degrees, and the granting of degrees, and the meeting of the Senate, and the meetings of Convocation, and in general touching all matters and things regarding the University not expressly provided by the said charter, and that the Chancellor and Fellows

for the time being should have full power from time to time to appoint as they should see occasion, or to remove all examining officers and servants of the said University ; and that Convocation should have the power of nominating three persons for every Fellow to be appointed as aforesaid from a list nominated by Convocation for the purpose of discussing any matter relating to the University, and of declaring the opinion of Convocation thereupon, of accepting any new charter, consenting to the surrender of the present or of any new charter, of deciding upon the mode of conducting and registering the proceedings of Convocation, of appointing or removing a clerk of convocation, and of prescribing his duties ; and that except as was therein expressly provided, the Convocation should not interfere in or have any control over the affairs of the University. And this charter has been duly accepted, and has been acted upon. The said Chancellor, Vice-Chancellor and Fellows have not made any bye-law or regulation touching or relating to the election of a member of the said General Council.—(The last-mentioned charter was to form part of the ease.)

The question for the opinion of the Court was, whether, under the charter and the 21 & 22 Viet. c. 90, the authority to choose such member is given to and vested in the Senate of the said University, or in the entire University consisting of Chancellor, Vice-Chancellor, Fellows and Graduates thereof.

Edward James (T. J. Clarke and Littler with him), for the Crown (June 9) argued that where a franchise is conferred upon a body corporate, such franchise is to be exercised by all the members, and that a sectional part has no power to act ; that the part of the charter which entrusts the management of the affairs and property of the University to the Senate could not be construed to extend to a franchise conferred upon the University by a statute passed subsequently ; that the Legislature would have given the authority to the Senate expressly if it had intended that it should be exercised by that part of the whole body ; that the objection that the whole body of the University had not the means of calling its members together applied equally to the Senate, which in the same manner had no such power ; and that if the requisite machinery had not been supplied, it was for the Legislature to supply it. The following cases were referred to :—*The King v. Westwood* (a), *The King v. Cutbush* (b), *The City of London v. Vanacher* (c), and *The King v. Ginever* (d).

Welsby, contra, contended that when the objects which the Legislature had in view in passing the Act, together with the

(a) 7 Bing. 1.

(c) 1 Lord Raym. 496.

(b) 4 Burr. 2204.

(d) 6 Term Rep. 732.

purposes for which the officers were to be appointed, were considered, it was clear that the authority was given to the Senate to exercise the franchise for the whole body of the University, that the Act was passed to enable persons requiring medical aid to distinguish qualified from unqualified practitioners, and persons were to be appointed to constitute the General Council; that the words of section 18 were as large as possible; that the whole charter showed that the Senate was the only body recognised to act for the whole University; that the power granted by the statute was a matter unprovided for by the charter, and that it would be most inconvenient if the Court decided that it must be exercised by the whole body of graduates.

Cur. adv. vult.

LORD CAMPBELL, C.J., now delivered the judgment of the Court.—The question which we have to determine in this case is, whether the defendant has been duly elected by the University of London a member of the General Council of Medical Education of the United Kingdom under the statute 21 & 22 Vict. c. 90. This statute enacts that this General Council shall consist of one person, chosen from time to time by each of certain specified bodies politic, among whom is the “University of London.” On the 3rd of November 1858, the defendant was elected a member of this General Council by the Chancellor, Vice-Chancellor and Fellows of the University of London, as the Senate of the said University, and he has since acted as a member of the council. On the part of the relator, it is contended that the election of a member of this council by the University of London cannot be made by the Senate, but must be made by all the persons enumerated in section 3 of the last charter granted to the University, comprehending all the graduates of the University. As the right of election is by the statute given to “the University of London,” and as the charter by section 3 constitutes certain individuals therein designated, “and all the persons on whom the University “had conferred degrees, and all the persons on whom the University “shall thereafter confer degrees, one body politic and corporate, “by the name of the University of London,” and as section 5 of the charter ordains that the said body politic and corporate shall consist of a Chancellor, Vice-Chancellor, Fellows and Graduates, if nothing to the contrary appeared in the charter there would seem strong grounds for contending that the election in question should be made by all those who are ordained by the charter to constitute the University, and, therefore, that all graduates of the University ought to have a voice in the election. But regard must be had to section 8 which ordains “that the Chancellor,

“Vice-Chancellor and Fellows for the time being shall constitute the Senate of the University,” and to section 18, which ordains “that the Chancellor, Vice-Chancellor and Fellows for the time being shall have the entire management of and superintendence over the affairs, concerns and property of the said University, and in all cases unprovided for by the charter, it shall be lawful for the Chancellor, Vice-Chancellor and Fellows to act in such manner as shall appear to them best calculated to promote the purposes intended by the University.” Now, this election of a member of the Medical Council is a case unprovided for by the charter, and it seems to come within the scope of the affairs and concerns of the University of and over which it is ordained that the Senate shall have the entire management and superintendence. If so, the members of the Senate ought to choose the member of the medical board, acting in such manner as shall appear to them best calculated to promote the object in view. However it might have been if an Act of Parliament had conferred upon the University of London the right of electing a member of the House of Commons without more distinctly defining the franchise, it can hardly be supposed that it was the intention of the legislature that all Doctors of Laws, Doctors of Medicine, Masters of Arts, Bachelors of Medicine and Bachelors of Arts, who may be Graduates of the University of London should be assembled to choose the member of the Medical Board, a choice in which the great bulk of them are likely to take no interest, and which must be made more conveniently and more directly by the Chancellor, Vice-Chancellor and Fellows constituting the Senate. For these reasons, we think that the election in question by the Senate was valid, and that we are bound to give judgment for the defendant.

Judgment for the defendant.

LADD v. GOULD

1860. January 21.

[24 J. P. 357]

Medical Registration Act—Falsely pretending to be practitioner—“Surgeon and mechanical dentist”—Question of fact—Conviction.

G. kept a chemist's shop, and on the door were the words, “surgeon and mechanical dentist.” He treated a woman for a bruised arm, and gave her a liniment. G. was summoned before the justices for falsely pretending to be a surgeon, but the justices declined to convict:—Held, the justices were right, and that it was a question of fact for them to say whether G. used the word “surgeon” in connection with

“dentist” merely to show what branch of the latter business he carried on.

This was a case stated by justices under the statute 20 & 21 Vict. c. 43.

On the 11th of October last an information was laid before the magistrates at Kingston-upon-Thames, against Frederick Gould, under the 40th section of the Medical Act (21 & 22 Vict. c. 90) for that he did, at his residence in Eden-street, take and use the title of surgeon without legal qualification, he not being registered under the Medical Act; and that in that capacity he treated one Charlotte Tenniswood for a surgical complaint, and supplied her with medicine for the same, contrary to the form of the statute, for which said medicine he was paid, and for which said offence he had forfeited a sum not exceeding £20.

When the information was heard, the prosecution was conducted by Mr. Ladd, the secretary of the London Medical Registration Society; and it was proved by the informer, Charlotte Tenniswood, that on the 5th of August last she went to Gould's shop, and told him she had knocked her elbow, and that it caused a great numbness in her arm and fingers. Gould examined her arm, and said she had undoubtedly jarred the marrow of the bone, and gave her a liniment, for which she paid him 1s. She said she noticed that he had “surgeon” on the side of his door, and she believed him to be a surgeon, or she would not have gone to him; but she afterwards said that the word “surgeon” was followed by the words “and mechanical dentist.” It was also proved that Gould's name, with the words “chemist and druggist,” was on the shop front, and that the woman went to his shop, which was also a chemist's and druggist's, because, she said, she thought he would supply her with something cheaper than by going to a doctor's. She also stated that she had made no complaint to the registration society but that on the day after she had got the liniment she consulted a surgeon, Mr. Ellis, and that he gave her a lotion, and told her not to use the liniment. Mr. Ellis afterwards called upon her with a gentleman, and asked her name, and said they should want her as a witness.

The magistrates were of opinion that Gould had used the word “surgeon” simply to show what branches of the business of dentist he carried on, and not to represent himself as a surgeon within the meaning of the Act; and, at all events, there was not sufficient evidence that he wilfully (as well as falsely) pretended to, or took, or used the name of a surgeon or other title implying that he was recognised by law as a surgeon.

They thereupon dismissed the information; but at the request of the appellant (Mr. Ladd) stated this case, and submitted for

the opinion of this Court whether, upon the evidence, Mr. Gould was guilty of the offence contemplated by the Act.

Lush, Q.C., for the appellant.—This case raises the question whether on the evidence there was sufficient to bring the respondent within the Act. The use of the word “surgeon” shows conclusively that he was taking and using a name and title which did not belong to him. The justices ought therefore to have found him guilty.

CROMPTON, J.—Is that not a question for the justices on which they were bound to draw their own conclusion? He does not use the word “surgeon” by itself, but coupled with the words “mechanical dentist.” That is the same thing as surgeon dentist which is a common enough designation.

COCKBURN, C.J.—You can scarcely say there was any false pretence in using the name of “surgeon” in connection with the other words. They merely denote a scientific dentist, if they mean anything more than dentist. The justices thought this was not a case which came within the Act; and I should have come to the same conclusion.

CROMPTON, J.—There was evidence from which the justices might have come to either of two conclusions. It was for them to find the fact, not for us.

Lush.—The justices ask the Court whether they drew a right conclusion from the facts.

COCKBURN, C.J.—We cannot say they drew a wrong conclusion. There does not seem to have been any intention to deceive, or any falsehood in using the name of surgeon. It was no more than using the name of “surgeon-dentists,” who, it is well known, are not in general surgeons, but merely dentists.

CROMPTON, J.—Or take the case of surgeon chiropodists, who are not, and don’t profess to be surgeons. It was for the justices to find as matter of fact whether the respondent had used the name wilfully and falsely. They were not bound to convict, and we cannot say they were wrong.

Judgment for respondent.

HAFFIELD v. MACKENZIE

1860. April 19.

[10 I. C. L. R. 289]

Reported also :

5 Ir. Jur. (N.S.) 215.

The proof of registration required by the 32nd section of the Medical Act (21 & 22 Vict. c. 90) by which medical men are

precluded from recovering for professional services, without proof of registry, is proof that the plaintiff is registered at the time he tenders such proof in evidence.

This was an action brought by a surgeon, to recover a sum of £137, claimed to be due from the defendant, for professional services rendered by the plaintiff, in the months of March and April 1859. At the trial, before GREENE, B., in the Consolidated Nisi Prius Court, the plaintiff proved the rendering of the services, and produced witnesses to prove that the charges made were reasonable. He then closed his case. The defendant's Counsel then called for a nonsuit, or a direction, on the ground that the plaintiff had not proved that he was registered under the 21 & 22 Vict. c. 90, the Medical Act. Evidence of registration was then tendered on behalf of the plaintiff, and received by the learned Judge, subject to the objection of the defendant's Counsel. The registry-book kept under the 21 & 22 Vict. c. 90 was then produced from the custody of the Registrar, by which it appeared that the plaintiff had been duly registered under the Act, on the 3rd of May 1859, subsequently to the rendering of the services for which he sued, but before the bringing of the present action. The plaintiff having again closed his case, the defendant's Counsel called for a nonsuit, or a direction, upon the ground that the plaintiff was not registered at the time when the professional services for which he sued were rendered, and that, under the Act, he was precluded from recovering for services rendered prior to registration. His Lordship refused to withdraw the case from the jury, but reserved leave for the defendant to move to have a nonsuit or a verdict for him entered, in case the Court above should be of opinion that he ought to have so directed. The jury having found a verdict for the plaintiff *J. Clarke*, in Michaelmas Term, obtained a conditional order to enter a nonsuit, or a verdict for the defendant, pursuant to the leave reserved.

R. Armstrong (with him *T. A. Purcell*) now showed cause.

The first question is, whether the evidence of registration given by the plaintiff at the trial was sufficient? We submit that the proof given by the plaintiff was sufficient, within the 32nd section. The work was done in March and April 1859; and the plaintiff was registered in May 1859. He was therefore registered at the time when the Act renders the proof necessary, viz., "at the trial." Even if it could be contended that the registration should be before action brought, that condition also had been complied with. To sustain the defendant's argument, the words in the 32nd section, "that he is registered under this Act," must be read "that he was registered under this Act at the time when the business was done." The plaintiff admittedly had the

qualifications which would entitle him to be registered. He had a right to practise before registration, for the statute contains no prohibitory words ; and he had a Common Law right to maintain an action for his professional services, which the statute, as we submit, qualifies in one respect only, that he should, " at the trial," prove that he was *then* registered. The great policy of the Act, which was to prevent unqualified persons practising, is satisfied by adopting the plaintiff's argument. The Act came into force on the 1st of October 1858 ; and there could be no publication of a registry until the 1st of January 1859 ; so that, according to the defendant's argument, everyone would be disqualified from practising between the 1st of October 1858 and the 1st of January 1859. Secondly : we submit that it is not open to the defendant, on the pleadings, to make this objection. The want of registry is not pleaded, which, since the Common Law Procedure Act, it should be, to entitle the defendant to rely on it. The plaintiff is only bound to make a *prima facie* case ; and it is for the defendant to show the grounds upon which he defends the action. Here the defendant, by merely traversing the doing of the work, admits the plaintiff was a surgeon.

J. Clarke and E. Jordan, contra.

The plaintiff was bound to show, as a condition precedent to his recovering in the action, that he was registered under the Act at the time when the work was done for which he sued. The preamble of the statute is " Whereas it is expedient that " persons requiring medical aid should be enabled to distinguish " qualified from unqualified practitioners." How could the patient know that he was attended by a qualified person, unless the medical man was registered at the time ? It is said that, as the list is to be published only on the 1st of January in every year. the public in the meantime could not know who was registered ; but the Act provides for local registries, in which a practitioner may get himself registered the moment he acquires a qualification ; and these are made evidence of the fact and time of registration. The date of the registry is to be stated in the certificate (section 25) ; and that date is to be inserted in the general registry. There would be no object in having the date stated, if it were not to prevent an unregistered person practising. That was the policy of the Act. According to the argument upon the other side, an utterly unqualified person may practise, and recover for his services, provided he obtains a qualification, and gets himself registered the day before the bringing of the action. Secondly : the registry was a matter which it lay upon the plaintiff to prove, as a condition precedent to his recovering in the action. It was a matter peculiarly within the plaintiff's knowledge. He might

be registered in one of the local registries in England, Ireland or Scotland, to which the defendant could not have access. The decisions upon an Act *in pari materia*, the Apothecaries Act (55 Geo. 3, c. 194 (Eng.)), show that this is a matter to be proved by the plaintiff, without regard to the defendant's pleading (*Morgan v. Ruddock* (a); *Shearwood v. Hay* (b); *Robinson v. Roland* (c)). The Medical Act, passed after the Common Law Procedure Act, adopts substantially the language of the Apothecaries Act; and we must assume that the Legislature intended to make the proof of registration in every case a part of the plaintiff's case.

T. A. Purcell, in reply.

The plaintiff, when the Act passed, was a qualified practitioner, and had a vested right at Common Law to recover for his professional services. The 31st section enacts that every person registered under the Act shall be entitled, according to his qualification, to practise medicine and surgery, and to recover reasonable charges for professional services rendered. That is an enabling, and not a restrictive, section. The plaintiff, after the passing of the Act, was still at liberty to practise, according to his qualification, and to recover for his services, provided he complied with the sole condition imposed upon him by the 32nd section, namely, proved a registry at the trial. The registration is an essential part of his proof; but it is not an essential element of his qualification, according to which he might practise and recover, as before the Act. The date of registration, therefore, is wholly immaterial.

Cur. adv. vult.

The judgment of the Court was delivered by PIGOT, C.B.

This was an action brought by a surgeon, to recover his fees for professional attendance on the defendant. At the trial, before my Brother GREENE, the plaintiff proved that he was a licentiate of the College of Surgeons, and that he had rendered the defendant certain services, for which he sued in this action, and then closed his case. The defendant's Counsel called for a nonsuit, on the ground that the plaintiff had not proved that he was registered under the 21 & 22 Vict. c. 90. My Brother GREENE (properly in our opinion) allowed the plaintiff to re-open his case, and to prove that he was so registered. But it appeared that the registry was in May 1859, subsequent to all the services which had been so proved. The defendant's Counsel then called on the learned Judge to direct a nonsuit, or a verdict for the defendant, on the ground that, by the statute, the plaintiff

(a) 4 Dowl. P. C. 311. (b) 5 Ad. & Ell. 383. (c) 6 Dowl. P. C. 271.

was precluded from recovering for professional services rendered before the registry. This my Brother GREENE refused to do. Some evidence was then given on the part of the defendant, chiefly (I believe) to reduce the demand ; and at the close of the case the defendant's Counsel repeated the requisition which he had before made. My Brother GREENE refused to comply ; but reserved leave to the defendant to move to have a nonsuit, or a verdict for the defendant, entered, if the Court should be of opinion that this ought to have been directed at the trial. Subject to that reservation the plaintiff obtained a verdict. A conditional order was obtained to enter a nonsuit, or a verdict for the defendant, pursuant to the leave reserved ; and the case was argued before us on the showing of cause against that conditional order.

It was contended, on the part of the plaintiff, that, as the defendant did not, by a defence, plead the non-registry, and as there was, therefore, no issue on which the jury could affirm or deny that the plaintiff was registered, it was not open to the defendant to object to the non-registry at the trial. The defendant's Counsel, on the other hand, insisted that, notwithstanding the form of our proceedings under the Common Law Procedure Act, the principle of the decisions made in England upon the Apothecaries Act (55 Geo. 3, c. 194), ss. 14, 20, 21, applied ; and that the plaintiff must fail, although the defendant did not plead the non-registry (*Morgan v. Ruddock*, *Shearwood v. Hay*, followed (with considerable doubt) by the Court of Exchequer in *Wagstaffe v. Sharpe* (d)).

It is unnecessary to consider the application of these authorities, because we are all of opinion that proof of a registry sufficient to maintain the action (on the assumption that it was open to the plaintiff to make the objection in the present state of the pleadings) was given at the trial. It is admitted that there is no provision in the 21 & 22 Vict. c. 90, which, in terms, prohibits an un-registered surgeon from practising, or from recovering fees for professional services rendered before registry. The only disabling section, in reference to the recovery of fees, is the 32nd. Upon the context of this section alone, it clearly requires nothing more than that, upon the trial, the plaintiff shall prove that he *is* registered. The present tense is used. It is used in connection with the time when the proof is required. That time is the time of the trial. If we hold that the Act requires a registration prior to the trial, we must substitute the past for the present, and read "is" "was." But that will not be enough to make the legislation intelligible. The present time is a single point of duration, but

the past comprises many periods ; and if we read the word as if it was in the past tense, we make the enactment wholly indefinite and uncertain, unless we superadd other words. We must, then, further determine this question, namely, *when*, before the trial, does the statute require the registry to have been effected, as a condition for recovering in the action ? Shall we decide that the registry must be “ before the bringing of the “ action ” or “ before the rendering of the service ” ? On this the statute is silent ; and we have no index whatever to guide us, except our own conjecture as to what the Legislature would probably have done if they were asked to frame an enactment. It is impossible that we can so interpret this section, without assuming the power of legislating, in the form and under the pretence of expounding. We have no authority to change the language of the Legislature, and introduce into the statute words which the Legislature have chosen to withhold. If there were something in other parts of the statute repugnant to the plain and ordinary meaning of the words of the 32nd section, but consistent with a less obvious meaning of which those words were susceptible, we might reject the former, and adopt the latter, in order to make the whole legislation consistent. So, if the ordinary meaning of the words would involve some absurdity, and they were capable of a reasonable interpretation, we ought to adopt what would be reasonable, in preference to what would be absurd. But absurdity in these words, in their ordinary sense, there is none. On the contrary, it was not unreasonable, and may have been very wise, in the Legislature, to abstain from prohibitions and penalties which might have made the statute odious, and to select, as sufficient for their purpose of encouraging and inducing medical men to register, the lesser, in preference to the larger and harsher disability. And even if the words of this section were, by any construction of them, however forced, capable of such a meaning as that for which the defendant’s Counsel have contended, namely, that the plaintiff should be registered before rendering the service for which he sues, there is nothing in the previous or subsequent parts of the statute which requires that construction, by presenting anything inconsistent with the plain and ordinary signification of the words, namely, that the plaintiff shall prove, upon the trial, that he *is* (that is, at the time of so proving) registered. The preamble of the statute recites that “ it is expedient that persons requiring medical aid should be “ enabled to distinguish qualified from unqualified practitioners.” A variety of provisions are then made, for the registry of qualified medical men ; for the annual publication of the registry ; for the appointment of a general and of local medical councils ; for

inquiry into the course of medical instruction and examination prevailing in certain colleges and bodies, and for inducing those bodies to improve such course of instruction and examination, if necessary, by withholding the privilege of registration from those on whom they should confer medical qualifications, until the requisite improvements should be made. The statute then, by the 31st section, enables every person registered under the Act to practise, and to recover charges for professional services, or for medicine supplied, in any part of Her Majesty's dominions. I concur in Mr. *Purcell's* argument, that this is an enabling, and not a disabling or restrictive, section. It removes (on the condition of registry as the price of the immunity) local restrictions prevailing under the existing law. For instance it was held, in *Collins v. Carnegie (e)* that "a person created a doctor by a Scotch "university" is not entitled to practise in England, unless he be licensed by the College of Physicians. The same section enables registered physicians to recover their fees, if the College of Physicians to which they belong do not, by a bye-law, decline that advantage. The 36th section prevents unregistered persons from holding any of the public appointments mentioned in that section. The 37th section provides that "no certificate required "by any Act," "from any physician," &c., shall be valid unless the person signing it be registered under this statute. And the 32nd section, without (as I read it) taking away the right to practise, or the right to sue for fees, previously existing by law, imposes this restraint upon unregistered persons and provides this stimulant to their registry, viz., that *at the trial* of an action for their fees, they must prove, as part of the procedure at the trial, that they are registered.

All those provisions tend greatly to encourage medical men to registry. The framers of the Act were probably conscious that, if they had proposed more stringent provisions, the measure would not have received the sanction of the Legislature. Nothing could have been easier than for the Legislature, if they had so designed, to prohibit unregistered persons from practising, or to impose penalties on those for practising, or to disable them for recovering for services rendered while they were unregistered. The Legislature had a precedent for so doing in the Act for the regulation of Apothecaries, 55 Geo. 3, c. 194, ss. 14, 20 and 21. By so doing, they might have applied more stringent means of advancing the purpose disclosed in the preamble of the Act. But they have not done so; and we cannot hold that they intended what they have abstained from expressing. We are not at liberty to strain, beyond their natural meaning, clear words, which

(e) 1 Ad. & Ell. 695; 3 N. & M. 703.

in that meaning are not inconsistent with anything else in the statute, and in their ordinary sense do not involve anything absurd or unreasonable, for the purposes of advancing what we may suppose to be the object of the Legislature. That mode of expounding statutes, if it ever did (as I fear it sometimes did) receive sanction from former Judges, must be considered as now exploded. It was said, by a living Judge of the very highest authority, Lord Wensleydale, in *Grey v. Pearson* (*f*) “I have been “long and deeply impressed with the wisdom of the rule, now, “I believe, universally adopted, at least in the Courts of Law in “Westminster Hall, that in construing wills, and indeed statutes, “and all written instruments, the grammatical and ordinary sense “of the words is to be adhered to, unless that would lead to some “absurdity, or repugnance, or inconsistency with the rest of the “instrument; in which case the grammatical and ordinary sense “of the words may be modified so as to avoid that absurdity and “inconsistency; but no farther. This is laid down by Mr. Justice “Burton, in a very excellent opinion, which is to be found in the “case of *Warburton v. Loveland*.” In this passage of Lord Wensleydale’s judgment, he adopts the very terms used by Mr. Justice Burton, in *Warburton v. Loveland* (*g*). The same principle of construction, applied to Acts of Parliament, had been long before laid down by Lord Wensleydale in the Court of Exchequer in *Becke v. Smith* (*h*). It was also stated, in *Miller v. Salomons* (*i*) by Baron Martin, who expressly adopted the passage referred to in Mr. Justice Burton’s judgment in *Warburton v. Loveland*. Besides the authorities cited in Darris on Statutes, pp. 579, 583, 584, 587, 588, 595, 597, 598, I may further mention the following recent instances in which similar views have been expressed by some of our most eminent Judges:—Lord Chief Justice Tindal, *Sussex Peerage Case* (*j*); Lord Brougham, *Fordyce v. Bridges* (*k*); Lord Langdale, *Logan v. Earl of Courtown* (*l*).

We are all of opinion that the verdict must stand, and that the cause shown must be allowed.

(*f*) 6 H. L. Cas. 106.

(*h*) 2 M. & W. 195.

(*j*) 11 Cl. & Fin. 143.

(*l*) 13 Beav. 29.

(*g*) 1 H. & Br. 648.

(*i*) 7 Exch. 527, 528.

(*k*) 1 H. L. Cas. 4.

PEDGRIFT *v.* CHEVALLIER

1860. May 28.

[29 L. J. (M. C.) 225]

Reported also :

8 C. B. (N.S.) 246 ; 2 L. T. 360 ; 6 Jur. (N.S.) 1341 ;
8 W. R. 500.

Surgeon ; falsely pretending to be—Medical Act (21 & 22 Vict. c. 90), ss. 27 and 40—Evidence :—Held, that the mere fact that a person, whose name did not appear in the medical register, represented himself to be a surgeon, was not sufficient to warrant a conviction under the 40th section.

CASE for the opinion of the Court under the 20 & 21 Vict. c. 43.

The defendant, Frederick Woodcock Pedgrift, was, at the petty sessions held at Halesworth, in Suffolk, on the 26th of October 1859, convicted, before three of Her Majesty's Justices of the Peace for that he, the defendant, did, on the 12th of October 1859, at Halesworth, in the said county, wilfully and falsely pretend to be a surgeon, contrary to the form of the statute in that case made and provided.

On the hearing of this case a book was produced, which was stated to be a copy of a medical register published in pursuance of the Medical Act. On the cover of this book are the words "By Authority," and the following is a copy of the title-page :—
"The Medical Register, pursuant to an act passed in the 21 & 22 Victoria cap. 90, to regulate the qualifications of practitioners in medicine and surgery, 1859, London. Published and sold at the office of the General Council of Medical Education and Registration of the United Kingdom, 32, Soho Square. Price 7s. 6d." The book then contains an account of the fees for registration, the names of the members and officers of the General Council of Medical Education and Registration, in which Dr. Francis Hawkins is stated to be Registrar of the General Council, some explanatory notes by Dr. Hawkins, the Medical Acts of 1858 and 1859, a table of abbreviations ; and then follow the names of medical men, with date of registration, residences and qualifications, extending over 335 pages, and headed with the words and figures, "The Medical Register, 1859" (a). It was also proved that on a door of the house in which the defendant and Mr. Richard

(a) The case omitted to state that the appellant's name did not appear in the Medical Register. See *post*.

Phibbs Irwin, a registered surgeon, lived, and for which they were jointly assessed to the rates, was a plate in a wooden frame, in which was engraved—

Mr. Pedgrift
Mr. Irwin
Surgeon, Accoucheur, &c.

It appeared that the name of Mr. Pedgrift was on a separate piece of plate from the rest, but there was no division between the names of Mr. Pedgrift and Mr. Irwin, except the line which was necessarily apparent where the two pieces of plate joined; it also appeared that “surgery” was written on another door, and “surgeon, accoucheur” on the lamp over the door.

For the defendant, it was objected, first, that the book produced was not a copy of the register within the meaning of the 27th section of the Medical Act, and was therefore improperly admitted in evidence; secondly, that there was no evidence that the defendant pretended to be a surgeon; thirdly, that there was no evidence that he was not a surgeon.

We considered that the words “surgeon” and “accoucheur” on the plate were intended to apply equally to Mr. Pedgrift and Mr. Irwin; we therefore considered that the defendant did, on the 12th of October, wilfully and falsely pretend to be a surgeon, and we convicted him of the offence with which he was charged in the penalty of £10 and £1 13s. costs. And he having served us with a notice that he was dissatisfied at our determination, as being erroneous in point of law, and made application for a case for the opinion of Her Majesty’s Court of Common Pleas at Westminster, we submit this case for the opinion of the Court, in order that if our determination be right the conviction may be affirmed, or if wrong may be reversed.

The case came on for argument on the 23rd of April, when *Lush* (*N. Palmer* with him) appeared for the appellant; but the Court sent the case back to the Justices, to ascertain if they had decided on any other grounds than those stated in the case.

The Justices returned that they “had no other grounds for holding the appellant to have falsely pretended to be a surgeon than those stated in the case; namely, that his name did not appear in the medical register, from which they assumed he was not a surgeon; and there was a plate upon the door mentioned in the case with the word ‘surgeon’ upon it from which they considered that he pretended he was a surgeon.”

Lush (*Bulwer* with him), for the appellant:—The first objection is, that there was no proper evidence of “The Medical Register” before the Justices. (They read 21 & 22 Vict. c. 90, s. 27.)

(WILLIAMS J.—If the words “by authority” on the cover of

the book are coupled with the rest of the title, the evidence is sufficient, is it not? ERLE, C.J.—I shall exercise all the faculties I possess to defeat this objection.)

Assuming the register to have been properly in evidence, there was not enough before the Justices to warrant the conviction. There was no proof that the appellant was not a qualified practitioner before the year 1815; in the absence of such proof, the Court may assume that he was. If he was, then, as at that time there was no qualification necessary to constitute a surgeon, he was a person “recognised by law as a surgeon” within the meaning of the 40th section. The Act contains no prohibition against a person practising as a surgeon since, in the same manner as he practised before, the Act. It only enables such persons to register, and confers privileges on them if they do, and deprives them of advantages if they do not. Many old practitioners to this day refuse to be registered.

(WILLIAMS J.—If the Act had said that no person shall practise as a surgeon who is not registered, the conviction would be right.)

Yes; but the Act contains no such provision, and the Justices have misread the 40th section.

(WILLIAMS J.—I understand your argument to go this length: that a person might commence practice as a surgeon even since this Act without being registered.)

Yes: but it is not necessary to go that length, because *non constat* but that the appellant was a duly qualified surgeon before the Act passed. If this conviction is affirmed, the Court must equally hold that an apothecary duly qualified to practise cannot do so unless he is registered. He also referred to Sections 15, 17 and 31; and to 22 Viet. c. 21, s. 2, and 23 Viet. c. 7, s. 3.

No Counsel appeared for the respondent.

ERLE, C.J.—We are asked to decide a question under an Act of much importance and of widely extended application; but the materials for our decision are very scanty. Unless we can see the essential facts proved necessary to support this conviction, we are bound not to confirm it. There is nothing in the case to show that the appellant was not in practice as a surgeon before the Act passed; there is nothing to show that he did not possess a diploma from some one of the various learned bodies who are entitled to confer it; there is nothing to show that he was not recognised by law as a surgeon, so far as a person might be entitled to practise the lawful trade of a surgeon, and entitled to enforce his rights; there is nothing to negative his qualification. The only facts are, that he called himself a surgeon, and was not registered. I do not think that that is enough; for it cannot be maintained that every person who calls himself a surgeon

without being registered is liable to be convicted. I am against the appellant on the other point, as to the book being improperly received in evidence ; but it is not necessary to give any opinion upon it.

WILLIAMS, J., and BYLES, J., concurred.

Conviction quashed.

ELLIS v. KELLY

1860. Nov. 14.

[30 L. J. (M. C.) 35]

Reported also :

6 H. & N. 222 ; 3 L. T. 331 ; 6 Jur. (N.S.) 1113 ; 9 W. R. 56.

The Medical Act (21 & 22 Vict. c. 90)—Assumption of title “ Doctor of Medicine ”—Conviction—Wilfully and falsely pretending to be a physician, &c.,—Practice—Right to begin.

The offence of wilfully and falsely pretending to be, or taking, or using the name or title of a physician, doctor of medicine, &c., under the Medical Act (21 & 22 Vict. c. 90), s. 40, is not established by the mere fact of a wrongful assumption of the title, if it appears to have been done under a supposed right.

Therefore where a surgeon, duly registered as such under the Act, prefixed the title “ Dr.” to his name on his door, but upon the hearing of an information under section 40, produced a document purporting to be a grant of a diploma from a German University :—Held, that the Justices rightly dismissed the information.

PET BRAMWELL, B.—*The wilful and false assumption of the title Doctor of Medicine, by a person duly registered as a surgeon, is an offence within the Medical Act.*

On a case stated by way of appeal from Justices, the party in support of the complaint below is entitled to begin.—Jones v. Taylor (a) confirmed.

CASE from petty sessions.—This was an information, preferred by the appellant, against Hubert Edmond Charles Kelly, of Pinner, in the County of Middlesex, surgeon, for having on the 2nd of November last, at Pinner, in the said county, wilfully and falsely pretended to be, and taking and using the name or title of a Doctor of Medicine, thereby implying that he was registered under the Act 21 & 22 Vict. c. 90.

On the hearing it was proved, first, that the defendant had for

(a) 28 L. J. (M. C.) 204, *note*.

years past, and on the day named in the information, a brass plate affixed on the outer gate of his residence, on which is "Dr. Kelly." The appellant put in evidence a published copy of the last Medical Register, in which his name appears as follows:—"Kelly, Hubert Edmond Charles, Pinner, Middlesex, Mem. Royal Coll. of Surgeons, England, 1856. Lic. Soc. Apoth. Lon. 1856." A witness stated that he had heard the respondent call himself Dr. Kelly.

For the defence, a document purporting to be a diploma of the University of Erlangen, in Bavaria, was put in, and in support of its genuineness the following witnesses were called.

Gustavus Morris Strauss, Doctor of Philosophy of Berlin, stated that he was acquainted with diplomas of the University of Erlangen; that one of the seals attached to the one produced was that of the great University, the other the seal of the Medical Faculty; that the diploma permitted the person therein named, Hubert Edmond Charles Kelly, to practise medicine throughout Germany. He believed the signature of one of the professors (Rosshuit) attached to the diploma to be genuine, as he had received a letter from Professor Rosshuit, but had never seen him write or sign his name.

On cross-examination he stated that he did not know the regulations of that University, but at five other Universities in Germany personal attendance to study before obtaining a diploma was necessary. Had seen Rosshuit's signature to a letter once.

Adolph Reinecher, Doctor of Medicine, of Berlin, sworn.—The diploma produced is of the form and shape of those of Erlangen; the seals to it, being pendent, are not like those now used, which are impressed. Formerly diplomas of Philosophy of German Universities were to be had for money, but not those for Medicine. No one who was reading in England could obtain a medical diploma without examination. He had seen diplomas of Erlangen precisely like that produced.

The complainant contended that the diploma put in by the defendant was not legally proved to be authentic and genuine; nor the person named in it shown to be the defendant, and that the same might have been proved if the defendant had left the document at the Registration office, when the Council would, through the Dean of Faculty at Erlangen, have ascertained the fact of its being genuine or not; and that if even these facts had been duly proved, the defendant not being registered as qualified by that diploma to practise as a doctor of medicine, had committed the offence charged in this information by having the title of "Doctor" on his brass plate in front of his house. And also that the possession of such foreign diploma did not entitle

the defendant to use the title of Doctor of Medicine in this country without being liable to the penalty imposed by the 40th section of 21 & 22 Viet. c. 90.

The defendant, by counsel, urged first, that even without the diploma there was no evidence of the title being used wilfully and with false pretence : secondly, that the mere use of the title could not necessarily imply that he was registered in the words of the information : thirdly, that the diploma and evidence respecting it were abundant to show that there was no wilful false pretence ; that the diploma was conclusive evidence of his being qualified to use the title of "M.D.", either in this or any foreign country ; that there was no evidence of his having practised as an M.D. ; and that being registered as a Surgeon and apothecary, it was not compulsory on him to register as "M.D." ; and that being possessed of this diploma, he could not be convicted of falsely pretending to be or using the title of M.D., within the purview of the statute creating the offence.

The Justices dismissed the information, with costs against the complainant, being of opinion that it was proved the defendant had practised in Pinner as a medical man assuming the title of Doctor of Medicine, and that he was not registered in the Medical Register as a Doctor of Medicine ; that the document produced before them as purporting to be a diploma from the University of Erlangen, was not proved ; that the possession of that document so far justified the defendant in assuming the title of Doctor of Medicine, that he could not be said to have assumed such title wilfully and falsely within the meaning of section 40 of the Medical Registration Act ; but they were of opinion also, that the Act does prohibit the use in England of the title of Doctor of Medicine obtained by virtue of any foreign diploma, unless the same is registered according to the provisions of the Act.

The opinion of the Court of Exchequer was requested first, whether the Medical Registration Act (21 & 22 Viet. c. 90) prohibits the taking and using of the title of Doctor of Medicine by any medical man in England, unless the said title be duly registered according to the provisions of the Act ; secondly, whether if the Court should be of opinion that the Act does prohibit the assuming of such title, the defendant under the circumstances can be held to have so done wilfully and falsely, within the meaning of the 40th section.

If the opinion of the Court should be in the negative on either question, then the judgment was to be confirmed. But if the opinion of the Court should be in the affirmative on both questions then the case was to be remitted to the Justices for further consideration.

Codd appeared for the appellant, and
B. C. Robinson, for the respondent.

A preliminary question was raised as to the right to begin. For the appellant, *Gardner v. Whitford* (b) was relied upon, and for the respondent, *The Blackpool Local Board of Health v. Bennett* (c) was cited.

WILDE, B.—Is not the rule now adopted by this Court in conformity with that in the Court of Queen's Bench, that in these cases the party who supports the decision of the Court below, must begin ?

BRAMWELL, B.—The general rule is, that the appellant shall begin. An exception exists in the case of an appeal against a conviction. There the respondent begins, because the burthen of proof is on him ; but here the burthen of proof is on the appellant, for here he has to make out that an offence was committed, the Justices having held that there was no offence. He ought therefore to begin. And I find that this is in accordance with the rule laid down by the Court of Queen's Bench in *Jones v. Taylor* (a). There the respondent was charged, before Justices in petty sessions, for wilfully trespassing on a railway ; and the Justices having dismissed the complaint, the complainant appealed, and the Counsel for the appellant claimed the right to begin. Lord Campbell, C.J., said, " In this Court the practice is for the respondent to begin " ; but upon the Counsel observing that the appellant had to support the complaint, Lord Campbell said, " In such a case we think the appellant should begin " ; and the appellant's counsel was thereupon heard (d).

POLLOCK, C.B., and CHANNELL, B., concurred.

Codd argued in support of the complaint.—There was no evidence before the Justices that the respondent was a Doctor of Medicine, for the alleged diploma was not proved, and so far the Justices were right in saying that it was not proved. Then the use of the title of Doctor of Medicine was proved, for practising as a surgeon and being registered as a surgeon, the use of the title " Doctor " could only refer to Doctor of Medicine. Then the user coupled with the absence of proof of qualification, which must rest with the respondent, showed that he falsely used the title within section 40 of the Act. Then, as it is clear the respondent used the name intentionally, he did it " wilfully." Again, the assumption of the title " Doctor " by a surgeon implies that he is qualified by law as a physician, which the defendant was not. The case of *Pedgrift v. Chevallier* (e) is distinguishable. A

(b) 4 C. B. R. (N.S.) 665. (c) 4 H. & N. 127 ; 28 L. J. (M. C.) 203.

(d) This was the course adopted in the Court of Exchequer in *Leech v. The North Staffordshire Railway Co.*, 29 L. J. (M. C.) 150.

(e) [*Ante* page 18.]

Surgeon who was in practice before 1815 is entitled to practise as a surgeon; and therefore he does not require any diploma or license; but that is not the case with a Doctor of Medicine. It is not necessary to constitute a false pretence that any words should be used (*The King v. Barnard* (f)).

B. C. Robinson, for the respondent, was not called upon.

POLLOCK, C.B.—I am of opinion that the respondent is entitled to the judgment of the Court. It is beyond doubt that for many years previous to the Medical Act he was called or had assumed the title of “Doctor,” which, as he practised medicine and surgery, must be taken to mean “Doctor of Medicine.” The real question in the case is, whether there was any reasonable evidence that the respondent wilfully and falsely called himself or pretended to be what he was not. I think that there was no such evidence.

BRAMWELL, B.—I am of the same opinion; and I may observe, in passing, that we have in this case an illustration of the reasonableness of putting the burthen of the argument on the party who has to establish his case affirmatively. The question depends upon the construction of section 40 of the Medical Act. That section is intended to protect the public from being imposed on by persons untruly representing themselves as legally qualified medical men. It appears to me that on the true construction of that section, if any person wilfully and falsely called himself a Doctor of Medicine, he would be liable to a penalty, although he was, in reality, a member of the College of Surgeons or of the Apothecaries’ Company, and was so registered. Section 30, I may observe, is confirmatory of that view, for that section empowers any registered person, upon acquiring any higher qualification, to have that subsequent qualification inserted in the register in substitution or in addition to the qualification previously registered. Assuming that the respondent was not, in fact, a Doctor of Medicine, the question is, whether he has assumed the title “wilfully and falsely,” for the statute does not impose the penalty for mere “incorrectness.” Now “wilfully” cannot here mean merely “intentionally” as opposed to “accidentally” (which is the meaning it sometimes has), for a man cannot accidentally call himself a Doctor of Medicine; and, therefore, the section must be read as pointing to wilful falsity. I see no evidence of that, and I cannot help observing that the information was a rather strong step to take; for no one can doubt that the respondent had a foreign diploma of some kind, and had, on the strength of that, called himself for a number of years “Dr. Kelly.” Is it to be said that because he has not taken that

name down on the passing of this statute, he has “ wilfully and falsely pretended to be, or taken or used the name or title of Doctor of Medicine ” ? The justices held that he had not, and I think they were right (*g*).

CHANNELL, B.—I think, under all the circumstances of the case, the appellant had not wilfully and falsely committed the offence described in the 40th section ; and I come to that conclusion upon it, forming no opinion at all upon the other points. I come to the conclusion on that point for the reasons assigned by my brother BRAMWELL.

WILDE, B.—I am of the same opinion. The only question of law is, what is the meaning of “ wilfully and falsely ” ? I agree that that means if a man pretends he has what he has not. And that being the meaning of the Act of Parliament, the view that the magistrates have taken is correct ; and the rest of the case seems to be a question of fact. It is really referred to us to determine whether the respondent acted wilfully and falsely, the fact being, that he had a German diploma in his pocket, which might lead him to the conclusion he contended for. A very similar case came before the Court of Queen’s Bench (*h*) ; and the learned Judges there were of opinion that it was a mere question of fact, and one that ought to be determined by the magistrates. There an individual had called himself a surgeon, and had written after it “ Mechanical Dentist,” and it was suggested that was the same as saying “ Surgeon Dentist ” ; and the Court of Queen’s Bench determined it was a question of fact whether the party has used those titles, knowing he was not entitled to them, and falsely intending to deceive the public. The only question of law is that turning on the Act of Parliament, and on that I agree not only with the rest of the Court, but with the magistrates.

Judgment for the respondent, with costs.

STEELE v. HAMILTON.

1860. Nov. 21.

[3 L. T. 322]

Medical Registration Act—Pretending to be a registered surgeon—Evidence.

The respondent was summoned upon an information before the stipendiary magistrate of Liverpool, and a complaint laid by the

[(*g*) See, however, *Andrews v. Styrap* (post at page 91) where Baron Bramwell, on this case being cited, said that he had changed his opinion.]

[(*h*) *Ladd v. Gould*, ante page 8.]

appellant, secretary of the Liverpool Medical Registration Association, which charged the respondent with having, on the 21st of February, 1860, wilfully and falsely pretended to be a surgeon and general practitioner or apothecary, or using a name, title, addition, or description implying that he was registered by law as a surgeon, contrary to the form of the statute, whereby he had incurred a penalty not exceeding £20, under the new Medical Act (21 & 22 Vict. c. 90, s. 40).

On the hearing it was proved that the respondent had given a certificate in the following terms:—"Medical certificate—" "I hereby certify that I attended William Hayes, late of 110, "Mill Street, who died 21st February; cause enteritis; and I have "no reason to attribute his death to poison, violence, or criminal "neglect. Signed, JOHN HAMILTON, Botanic Surgeon, Boston, "U.S., and 94, Mill Street, Feb. 22, 1860."

Over the door of the house where the respondent carried on his business was painted, in large legible characters, "J. Hamilton, Surgeon," and in very small letters underneath, "Boston, U.S., not registered in England"; and upon a glass panel of the door was painted, "J. Hamilton, anti-registered "surgeon." The word "anti-registered" was written in small letters in scroll-work between the name and the profession, and was illegible except upon close inspection.

The magistrate dismissed the information.

The question for the court was whether, under the circumstances, there was sufficient evidence to warrant a conviction under the 40th section of the Medical Act.

L. Temple.—No doubt the case of *Pedgrift v. Chevallier* [*ante*, page 18] is against the appellant so far as it applies to this case. Under the 40th section a person may be convicted either for wilfully or falsely pretending to be a surgeon, or for assuming any name or description implying that he is registered under the Act, or that he is recognised by law as a physician, surgeon, &c. (COCKBURN, C.J. — There is no provision that prevents a man from practising as a surgeon; the penalty for so doing is that he is disqualified from recovering his fees and from holding certain offices.) Section 37 enacts that no certificate required by any Act from any physician, surgeon, &c., shall be valid unless the person signing the same be registered under the Act. (HILL, J.—Any person present at the death may give such a certificate as the one here; 6 & 7 Will. 4, c. 86, s. 25 (a).)

[(a) This section was repealed by the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88) and by section 20 of that Act the registered medical practitioner in attendance during the last illness of the deceased person must give the certificate of the cause of death.]

It is very difficult to prove that a man was not in practice before 1815. (HILL, J.—You might prove that he was not forty years of age, or something that would cast on him the onus of proof that he was in practice before 1815.)

Cook Evans for the respondent.

By the COURT.—There is nothing to show that the respondent was not a surgeon.

Appeal dismissed.

ATTORNEY-GENERAL v. ROYAL COLLEGE OF PHYSICIANS OF LONDON

1861. May 1.

[9 W. R. 590]

Reported also :

1 J. & H. 561 ; 7 Jur. (N.S.) 511 ; 4 L. T. 356.

21 & 22 Vict. c. 90 (*The Medical Act*, 1858)—55 Geo. 3, c. 194 (*The Apothecaries Act*, 1815)—College of Physicians—Power to alter bye-laws—Licences to dispense drugs.

The privileges of the College of Physicians under their charter and statutes, including the right of altering their bye-laws and removing the restriction previously imposed upon their licentiates against supplying to patients for profit the medicines prescribed, are in no way abrogated by the Medical Act, 1858, which has not so unalterably fixed and limited the status of all qualified practitioners that the several medical bodies cannot, from time to time (within the limits of their charters), vary the qualifications and restrictions imposed by themselves.

Semble, that the Apothecaries Act, 1815, imposing (section 20) penalties upon persons “acting or practising as an apothecary” without the certificate of the society, but saving (section 29) the rights, authorities, and privileges of the College of Physicians, has no effect to prohibit the College of Physicians from granting licences for the practice of physic divested of any restriction against the supply of drugs.

Demurrer allowed to an information at the relation of the Apothecaries Society, seeking to restrain the College of Physicians from issuing any licence purporting to authorise the licentiate to compound and supply for gain the medicines prescribed by him.

This was a demurrer to an information filed by the Attorney-General, at the relation of the Apothecaries Society, for the purpose of restraining the College of Physicians from issuing

any licence purporting to authorise the licentiate to compound and supply for gain the medicines prescribed by him, or in any other way to exercise the calling of an apothecary, or purporting to establish any new order of medical practitioners. The information stated the incorporation of the College of Physicians by royal charter in 1519, and certain statutes passed in the reign of Henry VIII., for confirming and regulating the privileges and authority of physicians in London. Ever since their original constitution the College had consisted of "fellows," and also of "*permissi*" or licentiates. The members of each class were equally physicians, and although there was a distinction between the two classes with respect to their relation to the College, as to the form of their diploma and admission into the governing body, no such distinction was apparent to the external world. The College had always prohibited its members from exercising the "illiberal" art of compounding and selling drugs for gain, and in one of its ancient statutes declared that if any one, after admission into the body of licentiates, should have sought his livelihood in the trade of a drug-seller, or by selling any wares whatsoever, he should, so far as in the College lies, be deemed to have "fallen away from the body of licentiates." The bye-laws of the College also required that persons before admission into the order of licentiates should adduce evidence of having renounced their connection with the College of Surgeons or Society of Apothecaries (if previously members of either of them) and imposed a penalty of £10 upon any licentiate who should share with any druggist the profit upon the medicine prescribed by him. The plaintiffs, the Apothecaries Society, were incorporated by royal charter in the 15th of James I. (1617) with certain privileges as to the exercise by them of the mystery and faculty of an apothecary—consisting of the compounding and selling medicines. The effect of this charter was greatly to raise the position and character of the apothecaries, and they gradually acquired the right to give medical advice, and prescribe as well as sell the medicine compounded by them. This right was stated in the information to have been successfully vindicated against the College of Physicians in the reign of Queen Anne by one Rose, an apothecary (*College of Physicians v. Rose*, 6 Mod. 44; 5 Bro. P. C. 553). In 1815 the Apothecaries Act was passed establishing compulsory examination as a qualification for practising as an apothecary, and imposing a penalty of £20 for every offence upon all persons who should "act or practise as an apothecary" without having obtained the certificate of the Society. The Act contained a saving clause as to the "rights, authorities, privileges, and "immunities exercised and enjoyed by the Universities of Oxford and Cambridge, the College of Physicians, the College of Surgeons

“or the Society of Apothecaries, except such as should have been “altered, varied, or amended by the Act.” The practical effect of this Act was to vest exclusively in the Society of Apothecaries and persons obtaining their licence the right of supplying the medicines prescribed by them in medical cases. By the “Medical “Act” of 1858 a general medical council was established, consisting of representatives from the various medical bodies throughout the kingdom, with provisions for a registry of medical men of various classes and denominations. The information proceeded to state that the defendants had recently conceived the scheme of erecting the present licentiates into members of the College, and of establishing a new class of practitioners to be licensed by the defendants; that they intended that such new class should commence practice at an earlier age than, and be inferior in qualifications and attainments to, the present class of fellows and licentiates of the College, and that they intended to grant licences to such new class purporting to allow them to act as apothecaries, or to compound and supply for gain the medicines prescribed by them. In pursuance of this scheme the defendants passed certain bye-laws on the 8th of August 1859, regulating the election of fellows of the College who were to be excluded from the practice of pharmacy directly or indirectly. It was also provided that licentiates should be styled members of the College, and be alone eligible to the fellowship, the practice of pharmacy being also prohibited in the case of these members. Resolutions were also passed enabling the College to grant licences to practise physic to persons who should have complied with certain examination tests and other requirements; no person so licensed to be empowered to vend, compound, or dispense any medicines except for patients under his own medical care. In April 1860, the defendants, in pursuance of their scheme, passed a resolution to “grant licences to practise physic to persons who shall not be “restricted by any bye-law from supplying medicines to their “patients, and who shall be entitled to register under the Medical “Act as licentiates of the Royal College of Physicians of London.” Bye-laws were subsequently passed to regulate the position of this new body of licentiates. In restraint of this scheme the plaintiffs had filed the present information, charging that the design of the defendants was contrary to law, beyond the power and authority of the College, and an invasion of the rights and jurisdiction of the plaintiffs, and that it was a matter of great importance to the public that the defendants should not issue licences by which an apparent authority would be given to the licentiates to enter on a course of practice which would render them liable to the penalties imposed by the Act of 1815. To

this information the defendants, the Royal College of Physicians demurred.

Roundell Palmer, Q.C., Cleasby, Q.C. (of the Common Law bar), and *Osborne*, in support of the demurrer, contended that the act sought to be restrained by the information was legal and warrantable, and entirely within the scope of the authority and privileges, vested in and exercised by the defendants under their charter and Acts of Parliament, and in no way abrogated either by the Apothecaries Act of 1815, or the Medical Act of 1858; that there was no jurisdiction in a court of equity to interfere in the matter, the remedy, if grievance there were, being to put in force the penalties provided by the Apothecaries Act of 1815. At any rate, a Court of Common Law was the more proper tribunal for testing the question. If the act complained of was an illegal act, then it would be null and void, and an injunction was not required for the restraint of a mere nullity.

The Attorney-General, and *Hobhouse*, for the relators, in support of the information, contended that there was ample jurisdiction in a court of equity to restrain either the one or the other of these corporate bodies from exceeding, transgressing, or unduly extending the authorities conferred upon them by the Legislature. The Act of 1858 had recognised and assigned to each branch of the profession its distinct powers and sphere of action, which, therefore, became "stereotyped" without power of alteration, and it was a fraud upon that statute for the defendants to create, in violation of their own bye-laws, a new body of practitioners altogether unknown in the profession, of an "epicœne" order, partly physicians, partly apothecaries, but with the *status* and privileges of neither. The rights of the apothecaries, secured to them by the Act of 1815, enjoyed ever since, and confirmed in all their force by the Act of 1858, would also be seriously invaded if the defendants were permitted to carry out their design. In such a case, the Common Law remedies of "prohibition" or "*quo warranto*" were clearly inapplicable. In addition to these considerations, the Court was asked to grant the injunction upon the grounds of general policy, and protect the public from being flooded with unqualified young men, whose ignorance in the dispensing of medicines might occasion serious harm. It was essential, therefore, to the public welfare, to the ancient dignity of the College, to the authority and privileges of the relators, and the maintenance in their integrity of the provisions of the Legislature, that the Court should interpose to prevent this unauthorised attempt by the College of Physicians to do that which was not only *ultra vires*, but would go far to destroy the rank and position enjoyed by them for more than three centuries.

Cases cited :—*College of Physicians v. Rose*, 6 Mod. 44, 5 Bro. P. C. 553 ; *Dr. Letch's Case*, 4 Burr. 2186 ; *Chorley v. Bolcot*, 4 T. R. 317 ; *Veitch v. Russell*, 3 Q. B. 928 ; *Marsh & Rainsford's Case*, 2 Leon. 111, pl. cxlvi ; Willcock on the Medical Profession, 111, &c. (on the rights and privileges of physicians ;) *The Apothecaries Co. v. Collins*, 4 Bar. & Ad. 604 ; *The Apothecaries Co. v. Warburton*, 3 Bar. & Ald. 40 ; *Wagstaffe v. Sharpe*, 3 M. & W. 521 ; *Allison v. Haydon*, 4 Bing. 619 (on the rights and privileges of apothecaries) ; *The Attorney-General v. The Birmingham and Oxford Railway Co.*, 3 Mac. & Gor. 452 ; *Simpson v. Lord Howden*, 3 My. & Cr. 97 ; *The Attorney-General v. Great Northern Railway Co.*, 1 Drew. & Sm. 154, 8 W.R. 556 ; *Huggins v. The York Buildings Co.*, 2 Atk. 56 ; 1 Blackstone's Comm., 470, 480 (on Corporations), were also cited upon the question of jurisdiction.

WOOD, V.C., without calling for a reply, said that the demurrer must be allowed. The question arose upon a resolution passed by the College of Physicians to issue licences which, on the face of them, enabled the licensees to practise and dispense physic so long as they complied with the bye-laws of the College. That the College had power to grant such licences abstractedly considered (without reference to the Act of 1858) there could be no question. It was the very function, in fact, of the College to issue licences. But then it was said that the College had restricted themselves by their own bye-laws, which expressly prohibited any of their members from taking upon themselves to vend and dispense drugs. It was also urged that there was in existence another body, the Society of Apothecaries, with certain definite functions, who were authorised as an independent body to issue certificates for the business and practice of an apothecary, there being also the Royal College of Surgeons, who had at various times obtained charters from the Crown. In this state of things it was contended that the Medical Act of 1858 was framed for the purpose of protecting the public as to the practice of medicine, of securing to each branch of the profession the domain parcelled out to it, and confining practitioners to their several departments, according to their qualifications ; that each practitioner was to be enrolled under the certificate hitherto obtained by him, and then entitled to practise according to his qualification, and that "licentiate" was to mean licentiate as already constituted without the accession of any new character. Then it was said that it was a fraud upon the Medical Act to create and palm off upon the public a new body of men professing to be licentiates but not in reality licentiates within the meaning of the Act, and a

fraud of such a nature as to call for the protection of the public by the intervention of this Court, and further, that the jurisdiction of the Court to restrain any such act, and to enforce the compact with the Legislature was plain. But to support this argument it was necessary to assume that the *status* of licentiate was definitely fixed, and that the licence of the college, which from the earliest times they were entitled to grant, subject only to such bye-laws and restrictions as they thought proper to impose on the licensee, must now, after the Medical Act, 1858, be taken as stereotyped and bound for ever by the former conditions and restrictions. This point was put very definitely in the bill. But what were the conditions imposed by the bye-laws of the College? They might be divided into two classes—conditions precedent, as to the capacity and education, &c., of the candidates; and conditions subsequent, as to compliance with the bye-laws (restricting the vending of drugs, &c.) after receiving the licence. In one sense this prohibition was a condition precedent, but it would be more convenient to treat it as a condition subsequent. What evidence, then, was there that these conditions were to remain unalterably fixed, as contended for by the plaintiffs? On the face of the Medical Act there was nothing to that effect—nothing to restrict the bye-laws to their existing state. With regard to the preceding qualification as to education, there was nothing to restrict the College, who had the power of granting licences, as to the conditions they should impose, nor as to the relaxation of those conditions. There were special clauses in the Act providing that the General Council should have full opportunity at all times of prescribing the course of education of those receiving certificates or licences from any of the public bodies. In that state of things it would be absurd to suppose that the College of Physicians were not to have full power to modify, from time to time, the qualifications required for admission into their body, with the control of the General Council. The only point on which the Legislature interfered in this respect was that particular theories, such as homœopathy, mesmerism, and the like—were not to act as disqualifications. Even assuming that the College was precluded by the Act from relaxing its conditions subsequent (disqualifying the licensee on his becoming a seller of drugs) he was by no means sure that this would be sufficient to sustain the bill, or that the licences proposed to be granted by the College must not be left to be tested at their worth in a court of law. The real question was, how far the design of the defendants was a fraud upon the Legislature, and how far they were precluded from altering their own bye-laws, by which alone, as it appeared to him, the College as between themselves

and the licensee had restricted him from selling drugs. Their original charter admitted the whole domain of physic within its purview. Not only "physic" but surgery was included, and its effect was to throw the universal medical science under the control of the College of Physicians. Up to the 15th of James I., no one could have disputed the right of the College to deal with the question of selling medicines, and to revoke any bye-laws made by them upon the subject. It might be observed that the very existence of such a bye-law implied that it would have been the custom of physicians to deal in drugs but for such a restriction. No doubt, considerable inconvenience was occasioned to the public from the restriction, and this gave rise to the apothecaries and their incorporation by James I. The apothecaries from the very humble position of grocers and mere drug-sellers gradually acquired greater knowledge as to the properties of drugs and skill in their administration. They were accordingly incorporated by charter from James I., with certain privileges to themselves and restrictions against others. It could not be maintained for an instant that this charter had in any way interfered with the privileges of the College of Physicians granted by charter and confirmed by statute. From the time of Henry VIII. down to 1815 it was not possible to suggest a doubt that the College might have relaxed any of their bye-laws, including that which restricted the sale of drugs. Then came the Apothecaries Act of 1815 which incorporated the Society of Apothecaries, and gave them the power of examining all persons to see that they were duly qualified. The object of that was, of course, to secure to the public the services of an able body of men competent to discharge the important duties intrusted to them. The 5th section of that Act insisted on their making up the prescription that any medical man should sign with his initials, evidently with a view to the protection of the physicians themselves from any improper conduct on the part of the apothecaries, because the physician was the only person who could sue on that section. Then the 20th section enacted that if any person except such as had been practising as an apothecary before the 1st of August 1815 should practise as an apothecary in any part of England or Wales without having obtained the certificate of the Apothecaries Company, he should forfeit the sum of £20. It was contended that the saving clause (sect. 29) did not preserve to the College the right which existed before the act of granting licences to practise physic divested of the restriction contained in their bye-laws, because the saving was "except so far as the rights were altered, varied, and amended by the Act." Under section 20, therefore, no one could practise as an apothecary without the certificate of

the society, and any person licensed by the College, without a restriction preventing him from making up and selling the medicines prescribed by him, would be practising as an apothecary, and to that extent be within section 20. The physicians, therefore (it was contended), must either keep up their bye-law or leave the licensee exposed to the consequences of practising as an apothecary. To say the least, the matter was far too doubtful to induce the Court to interfere. Lord Cottenham had more than once said he would not interfere against any public body, supposed to be acting in contravention of its Parliamentary powers, where the matter was doubtful, and there was serious ground for saying that such public body was acting *bona fide* (*The London and North Western Railway Co. v. Smith*, 1 Mac. & Gor. 216; *The East and West India Docks Co. v. Gattke*, 3 Mac. & Gor. 155), especially when the question could be determined through the medium of a court of law. Was it clear that the privilege which existed up to 1815 in the College of Physicians was abolished, and that the 20th section applied to the ease of the College of Physicians granting licences under which persons might practise physic, including the sale of physic, as well as to the case of every other person practising the art of an apothecary? Many persons might practise a part of the business of an apothecary, without practising the whole business, as in the case of the farrier, who, though he was held liable in respect of his selling drugs, was held not liable in respect of practising as an apothecary, inasmuch as he was not exercising the whole art. So here there was the important fact that surgeons could charge for the medicines which they administered in a surgical case, and that had not been held hitherto, and was in fact conceded not to be, an infringement of the 20th section of the Act. Unless, therefore, there were some Act of Parliament conferring on surgeons this privilege, and none had been cited, surgeons and physicians must be deemed to be in the same position as to the saving clause. (*Hobhouse* here explained that the apothecaries had power under their Act of Parliament to administer medicines for profit in medical cases, but that they had no such power in surgical cases.) His Honour then referred to *The Apothecaries Society v. Collins* (4 Bar. & Ad. 604), the case of a Scotch medical man coming to England with his Scotch diploma, and insisting upon his right to practise as an apothecary in England. It was held that he had no such right, and the case of an English physician would be the same were it not for the saving in the Act. It was enough to say, that it was far from clear that anything contained in this Act would prohibit the physician from doing anything which the Act of Henry VIII. authorised him to do. There

was no express repeal of the privileges of the College of Physicians, but on the contrary an express saving, and unless the two things were so absolutely inconsistent that one of them must of necessity be excluded, he could not come to the conclusion that the privileges vested in the College were abrogated by section 20 of the Apothecaries Act (imposing a penalty of £20 upon anyone acting or practising as an apothecary without the licence of the society). Upon this part of the case it was important to know whether physicians could sustain an action, and recover for their services. In *Chorley v. Bolcot*, Lord Kenyon seemed to have determined that they could not sustain an action, the ground being that the patient dealt on the faith of the general custom. (His Honour referred to the case.) It might have made a considerable difference if it had been decided that a physician could under no circumstances charge in respect of his pains and attention, for the bye-law (though the Medical Act, 1858, s. 31, contemplates that such a bye-law may be passed) only says that no licentiate shall sell drugs. The power of charging on special contract remained, and if they had the power originally of selling drugs as a portion of their practice in medicine, and charging for that practice, then as soon as the bye-law was repealed, the licensees would be entitled both to attend the case and to supply the medicines prescribed by them. He then came to the most important Act of all, the Act of 1858. It had been contended that as the Legislature must have been aware of the previous *status* of licentiates, the creation of a new body of licentiates would be a fraud upon the Act. But until 1815 it was clear that the College had full power to regulate by their bye-laws the question of whether or not a licentiate should be paid for the drugs that he prescribed; and if it were necessary to determine the question upon this ground, he thought that the Act of that year did not abrogate such right. It was enough to say that the matter was left doubtful, and that there might be a question to be tried. Then, upon the Act of 1858, was the intention on the face of it evident that a licentiate of each of the bodies there named should, irrespective of all powers contained in their several charters, remain for all time in his then position; in other words, was it intended to abrogate all the powers of enacting bye-laws conferred by the charters on these several bodies? There was not a *scintilla* of evidence on the face of the Act of such an intention to deprive any one of the medical bodies of their power to alter their bye-laws, so long as they kept within the limits of their charter. If he were to import into the case the knowledge possessed by the Legislature, all that could be assumed would be a knowledge of the exact state of things then existing;

and Parliament must be taken to have known that bye-laws could always be altered or abrogated by the bodies who had made them. His Honour then referred to the preamble and to section 20, to the effect that none but qualified persons should be put upon the register ; and providing that there should always be a sufficiently high standard of education ; in support of his view that there was nothing in the Act to abrogate the powers existing in the several medical bodies. The only grievance alleged in the information, was that the defendants were elevating the old licentiates into members of the foundation, as it were, and creating a new body inferior in qualifications to the former. The question, however, returned to this :—Had the defendants authority to do this act ? If so, the General Council would know whether the licence was founded upon a sufficient qualification test. The information did not state that this new body would be apothecaries, but “ to some extent a class of apothecaries.” In his view of the case, no possible amendment would help the information. Assuming, for the moment, that the plaintiffs would have a right of action against these new licentiates, who took their licences with knowledge of the Act of 1815, still the College of Physicians would not degrade their licentiates for selling drugs, and the worst that would happen would be that they might have to obtain the certificate from the Society of Apothecaries. As to the argument, as a ground for the interference of the Attorney-General, of public injury arising from the harm done to these young men who accepted the licences from the College, and were consequently deceived, he confessed that he did not attribute much weight to it. The legal maxim “ *Volenti non fit injuria* ” would apply to such a case ; unless, therefore, the bill could be supported on the ground argued by the Attorney-General, of fraud upon the Legislature, the case of the plaintiffs must fail. In conclusion there was not a shadow of a pretence for saying that down to 1815 the privileges originally conferred upon the College of Physicians had been in any way either by custom or otherwise abrogated. The Act of 1815, though doubtful, did not, in his opinion, prevent the College from altering their bye-laws, and clearly the Act of 1858 had not that effect, so long as they kept within the limits of their charter. Upon these grounds the demurrer must be allowed, and it was not a case for granting leave to amend.

REGINA v. THE GENERAL MEDICAL COUNCIL (ORGAN'S CASE)

1861. Jan. 21.

[30 L. J. (Q. B.) 201]

Reported also :

3 E. & E. 525 ; 3 L. T. 692 ; 7 Jur. (N.S.) 798 ; 9 W. R. 413.

See also Minutes of General Medical Council :

Vol. I. (1859) 55, 69, 213, 243 ; (1860) 81, 83, 84, 94, 95, 96, 97, 103, 104.

Vol. II. (1861) 9 ; (1863) 156.

Vol. III. (1864) 69.

Vol. IV. (1866) 67, 68.

Vol. V. (1867) 189, 190, 202.

Medical Act (21 & 22 Vict. c. 90), ss. 26 and 29.—*Fraudulent Registration—Offence by Practitioner.*

The 26th section of the Medical Act (21 & 22 Vict. c. 90) *applies to cases in which the registration has taken place under the dispensing power conferred on the Council by the 46th section, as well as to the registration by the registrar under the 15th section.*

Section 29 extends to conduct of which the practitioner has been guilty before registration.

This was a rule calling on the General Council of Medical Education and Registration to show cause why a writ of mandamus should not issue, commanding them to restore the name of Richard Organ to the medical register.

It appeared from the affidavits that Richard Organ, having been in 1859 inserted in the medical register, as being a surgeon in the public service, by the Branch Medical Council for England, under the 21 & 22 Vict. c. 90, s. 46, on his petition, &c., dated the 12th of January 1859, was afterwards, in consequence of certain charges made against him, removed from the register by the General Council ; and in Easter Term, 1860, this Court made a rule absolute for a mandamus to restore him, on the ground that he had not been heard in his defence before removal. The Council, in obedience to this rule, at once restored his name to the register, and soon afterwards, on or about the 29th of May 1860, gave him the following notice :—

“ Medical Registration Office, 32, Soho Square,
“ London, W.C., May 28, 1860.

“ Sir,—Information having reached the Medical Council that
“ you are not possessed of any qualification entitling you to registration, and that certain of the representations contained in
“ your memorial to the Council, dated the 12th of January 1859, are
“ untrue, and that your name has been incorrectly placed on the
“ Medical Register, and, further, that you have been guilty of
“ conduct infamous in a professional respect, in endeavouring to
“ obtain by fraudulent means a diploma from the Royal College
“ of Surgeons in Edinburgh, I have to inform you that on the 18th
“ day of June now next ensuing, at three o’clock in the afternoon,
“ the Medical Council will meet at the Royal College of Physicians
“ in Pall Mall East, London, and will then and there institute an
“ investigation into the truth of these allegations, with a view to
“ decide whether, on all or any of the above grounds, your name
“ ought to be erased from the Medical Register. At that investigation you are hereby invited and requested to be present. You
“ will also take notice, that the meeting of the Council is fixed
“ peremptorily for the day hereinbefore named, on which day the
“ inquiry will be prosecuted, whether you attend or not.

“ Francis Hawkins, M.D., Registrar.”

On the receipt of this notice Mr. Organ’s attorney wrote to inquire whether Mr. Organ would be allowed to appear by counsel, and, also, for further information as to which of the representations in his memorial were said to be incorrect, and he received an answer from the Registrar, referring him “ especially to the
“ statements as to his (Mr. Organ’s) appointments as medical
“ officer and public vaccinator to various parishes,” adding, “ but
“ the Medical Council do not, of course, bind themselves to confine
“ their inquiries exclusively to that part of the memorial. I am
“ directed by the Council to inform you, that whilst they are ready
“ to allow Mr. Organ the fullest opportunity of explaining and
“ answering the allegations made against him, they do not think
“ fit to grant his application to be heard by counsel.”

The attorney wrote in reply that Mr. Organ would appear under protest, and offer no evidence. Organ and his attorney accordingly attended the meeting on the 18th of June, and, after protest on their part, the Council proceeded to read affidavits, in which the facts were detailed on which the charges pointed out in their notice of the 28th of May were founded, the transaction with regard to the diploma at Edinburgh having taken place early in the year 1858. After the reading of the affidavits, in answer to the offer by the chairman, Mr. Organ and his attorney

again protested and declined to interfere. The Council, on the following day (19th of June, 1860), passed the following resolutions, and forwarded copies of them to Mr. Organ :—

“ That it having been proved to the satisfaction of the General Council that the entry of the name of Richard Organ has been fraudulently and incorrectly made on the register, the General Council do by this order in writing direct that his name be erased from the register ; that Richard Organ having been judged by this General Council, after due inquiry, to have been guilty of infamous conduct in a professional respect, the General Council do hereby adjudge that the name of the said Richard Organ be erased from the register, and do by this order direct the registrar to erase his name from the register accordingly.”

M. Smith and *Sleigh* showed cause. The Council had jurisdiction to order the name to be erased under section 29, although the misconduct took place before registration. The adjudication only need be after registration. It is clear that if a conviction takes place after registration the Council would have jurisdiction, and the same construction must apply to the adjudication by the Council, which is tantamount to a conviction.

(CROMPTON, J.—Section 15 seems to give a right to a person showing certain qualifications to call on the Registrar to insert his name. It does not seem that he could exercise any discretion and refuse to insert an infamous person if qualified. It was, therefore, necessary to give this power to the Council.)

Secondly, the latter part of section 26 is general, and applies to any person on the register, however he got there, and not simply to cases where he has been inserted by the registrar.

Hayes, Serj., in support of the rule.—The term “ infamous conduct ” in a professional respect is very loose ; the Council ought to have stated the specific charges. The 15th section gives an absolute right to all persons duly qualified to be placed on the register, and this affords a strong argument that nothing that has taken place before that should have any effect.

(CROMPTON, J.—It may well not be considered right to give any discretion to the Registrar alone.)

This is a restrictive Act, and takes away a pre-existing right and must, therefore, be construed strictly.

(CROMPTON, J.—It is a protective Act, and was intended to interfere in a qualified manner with vested rights.)

The whole section must have reference to acts committed after the person is registered. The words “ any registered practitioner ” point to this, and “ to have been guilty ” are the only words that could have been used, and refer to the time of the adjudication. If a person had been convicted before the Act

passed, it is quite clear he would not be within the section ; and yet if the section was not intended to apply to future offences alone, there is this anomaly, that a person guilty before registration, but not convicted till afterwards, is liable to be removed ; but if guilty and convicted before, he cannot be removed. Is the latter less unfit than the former to remain on the register ? Secondly, the 26th section does not apply to a person registered under the 46th section, but comes only by way of appeal from the registrar. Section 29 is the first section that gives primary jurisdiction to the Council.

(HILL, J.—The latter clause of the 26th section is not by way of appeal, even if it extend only to registration by the Registrar ; it applies to a case where the Registrar has not decided anything, but has been deceived or incorrectly informed.)

CROMPTON, J.—It being discretionary with the Court to grant a mandamus in such a case as the present, I am of opinion that this rule ought to be discharged. But apart from the merits, I am of opinion that the General Council acted perfectly legally, and that they have properly decided the applicant's case under the 26th section, which I think is applicable to it. It has been said that the Council ought to find the specific charges when the facts are disputed, but in the present case a mandamus was granted by this Court to enable the applicant to obtain a hearing, and when facts were *prima facie* proved against him in his presence he asks to be heard by counsel, which the Council in their discretion refuse, but he declines to adduce any evidence in reply. I cannot, therefore, say that there is sufficient doubt as to the facts to induce us to call upon the Council for a return. I think the finding of the Council is sufficient and binding upon us, if they had, as I think they had, power to adjudicate under the circumstances, and that we have no right to interfere. By section 15 a right is given to persons possessing certain qualifications to be registered on application, or on the mere sending in of their diplomas. (*The learned Judge then read the 26th section.*) It is quite clear that this removal may take place on the application of a third party ; but it is said that the fraud must be either by or upon the Registrar, and that, inasmuch as the present registration was by the Council and not by the registrar, the 26th section does not apply. But I do not think its operation is to be confined to cases of registration under the 15th section. If it were to be so confined, sections 29 and 39 must be similarly confined, and would only apply to cases where the offender had been registered under section 15. But by section 46 another means of registration is given, namely, by application to the Council for the exercise of their dispensing power ; and looking at

the whole scheme of the Act, I see no reason why the registration under this 46th section should be excluded from the operation of those other sections, the language used in them being quite general. I am also of opinion that the case comes within the operation of the 29th section. It is said that to hold this would be to make the Act retrospective, and, so far as it applies to persons who, before the Act, were entitled to practise, it is. The phrase, "shall be judged," taken by itself, might admit of doubt, but the time pointed out in each case is the time of conviction or the time of adjudication, and not the time of committing the offence.

HILL, J.—On the first point, that the case comes within the 26th section, I entirely agree with my brother CROMPTON, and that the granting of a mandamus is to a certain extent discretionary with the Court. But even if the law were not so, I am clearly of opinion that we ought not to interfere on the present occasion. The facts are, that some time ago Mr. Organ, having procured himself to be registered under the 46th section, and having been removed without a hearing from the register, obtained a rule for a mandamus to the General Council to restore him. This amounted, in fact, to a mandamus to the Council to hear him; and accordingly they immediately restored him in obedience to the rule of this Court, and then called upon him to answer certain specific charges; he asked to be heard by counsel, which the Council refused, as they had a right to do; and he attended according to the notice, and on hearing the evidence on the specific charges against him, declined to give any evidence to rebut them, and disputed the jurisdiction of the Council to act either under the 26th or 29th section. The Council found that the charge that he had obtained his registration fraudulently was proved, and they ordered his name to be removed accordingly. This they had a perfect right to do if the case falls within the 26th section. The Council also find that he had been guilty of infamous conduct, and remove his name under the 29th section also. I am of opinion that the case falls within the latter clause of the 26th section. The 15th section gives a right to all persons possessing certain qualifications to be placed on the register, and to call on the Registrar to place them there. Section 17 entitles all persons practising medicine before 1815 to the same advantage. Section 46 contains a dispensing power by which the General Council are enabled, by special orders, to dispense with the provisions and regulations under the Act in favour of certain classes of practitioners. The present applicant applied and was admitted by the Council under the 46th section; and it has been argued on his behalf that the 26th section does not apply to a person admitted under the 46th section, but only where the person has been admitted by the Registrar. I think

that the last clause in the 26th section must be read in conjunction with the 39th section which is quite general, and must apply to a man whether he be registered under the 46th, or under the 15th or 17th sections. And the plain language of the latter part of the 26th section, therefore, applies to any case in which the registration has been obtained by fraud, or otherwise incorrectly made, whether by the Registrar or Council. I am also of opinion that the 29th section applies to the present case; if a conviction takes place after registration, although for an offence committed before, the case is equally within the clause as if the guilty act had also taken place after registration; and in like manner the section applies to a case where the adjudication takes place after registration, although the infamous conduct occurred before. It is not absolutely necessary to decide this latter point in the present case, the first being sufficient to dispose of it; but I think it right not to withhold my opinion on the second point, entertaining it so strongly as I do.

Rule discharged with costs.

REGINA v. STEELE

1861. June 10.

[13 I. C. L. R. 398]

See also Minutes of General Medical Council :

Vol. II. (1861) 408, 412, 413, 417.

When the Registrar of the Branch Medical Council inserts in, and afterwards, by order of such Branch Council, and without notice to the party registered, strikes out of the register the description of a qualification which the evidence produced to the Registrar by the claimant did not show that he had obtained, the Court will not by mandamus compel the Registrar to re-insert such description.

MANDAMUS :—In last Easter Term, the prosecutor obtained a conditional order for a writ of mandamus, “directed to the said William Edward Steele, commanding him, as Registrar of the Branch Council for Ireland under ‘The Medical Act,’ to restore the entry in the local register for Ireland, under said Act, of the name and qualification therein of the said James Barker junior, to the same state as such entry was originally made by the said W. E. Steele, as such Registrar; and that he do insert in the said register the letters ‘M.D.,’ struck out therefrom by him without authority in that behalf; or that he enter on said register as part of the medical qualifications of the said James Barker junior, as a licentiate of the King’s and Queen’s College of Physicians

“in Ireland aforesaid the words ‘as Doctor of Medicine,’ after “the word ‘Licentiate’ in the column of said Register entitled “‘Qualifications.’”

The conditional order was granted on the prosecutor’s affidavit, which stated that the deponent had received from the King’s and Queen’s College of Physicians in Ireland, its diploma or licence, dated the 27th of April 1860, testifying that he had, on examination, proved himself learned and skilled in medicine, and granting him licence to practise in medicine; that the Branch Medical Council for Ireland had elected W. E. Steele as their Registrar, who, as such Registrar, having been satisfied by proper evidence that the deponent was entitled to be registered in the Local Medical Register for Ireland, pursuant to the “Medical Act,” as a Licentiate of the College of Physicians, and as a Licentiate of the Royal College of Surgeons in Ireland, on the 7th of February 1861, entered in the said Local Register the name, address, and qualification of the deponent, as follows:—

Date	Name	Residence	Qualification
7th February 1861	Barker, James, jun.	24 North Cumberland- street	Lic. & M.D., K. Q. Coll. Phys. Ireland 1860. Lic. R. Coll. Surg. Ireland 1859

and that the letters “M.D.” in said entry were meant to express that he was a Licentiate as Doctor of Medicine of the King’s and Queen’s College of Physicians in Ireland.

At a meeting of the Branch Council for Ireland, held on the 16th of February 1861, the following resolution was carried by the casting vote of the chairman:—“That the Registrar be directed “to expunge from the Local Medical Register for Ireland the title “of M.D., which has been illegally attached to the names of the “following persons” (of which the deponent’s name was one); “and that he be required henceforward to conduct the local “register in strict accordance with the regulations of the General “Medical Council, and the provisions of the Medical Act, and “refuse for the future to register the title of M.D., of the College “of Physicians.” In obedience to that resolution, the Registrar immediately struck out the letters “M.D.,” without notice to the deponent. On the 29th of April 1861, deponent caused the Registrar to be served with a notice requiring him to amend the entry in the terms of the conditional order, and stating his intention to apply for a writ of mandamus in default of compliance with the notice. On the 1st of May 1861, deponent in person

produced his diploma to the Registrar, and required him to make the alterations; the Registrar refused to do so.

The affidavit further stated, that the College is empowered by charter to grant licences to persons to practise in midwifery, and also licences to practise as persons learned in medicine or physic; and that, from the date of the charters, all Licentiates of the latter class have been publicly known and designated as Doctors of Medicine or Doctors of Physic, and are so called and recognised by several public Acts of Parliament; and that such distinction is an important and necessary part of their qualification. And that, inasmuch as the Medical Act in its preamble states its object to be "That persons requiring medical aid should be "enabled to distinguish qualified from unqualified practitioners," it is necessary that the particular nature and extent of the qualifications and medical titles conferred on Licentiates of the said College, whether as Doctors of Medicine, or as Licentiates in Midwifery, only, or in both, as the case may be, should appear on the medical registry; and that the omission to state such qualification of the deponent as a Doctor of Medicine, or Doctor of Physic, or as a learned practiser in physic, or learned Physician (all of which deponent believes are convertible terms, having the same meaning) on the said Medical Register, is and would be injurious to the deponent.

The Registrar, in his affidavit filed as cause, stated that, in pursuance of a resolution of the Branch Council, passed on the 29th of December 1860, authorising him so to do, he inserted in the Local Register the letters "M.D.," after the name of every applicant who required him to do so, and who was a Licentiate of the King's and Queen's College of Physicians; that he transmitted those names to the Registrar of the General Council, whom he requested to copy into the general register, the qualifications of the said Licentiates as entered in the local register, with the addition of "M.D." to their respective names; and that the Registrar of the General Council, in his reply, dated the 6th of February 1861, said that the executive committee of the General Council was advised that the King's and Queen's College of Physicians had no power to grant the title "M.D."; that, if it had, that qualification was not enumerated in "The Medical Act," schedule (A), and therefore, could not be registered; that he would not copy the letters "M.D." into the General Register, as it was an entry in the Local Register on its face erroneous; and that he was instructed by the executive committee of the General Council, to request that such entries may be struck out.

When this reply was laid before the Branch Council, they passed the resolution of the 16th of February 1861, in compliance with

which deponent expunged the letters "M.D."; and deponent says that those letters were intended to express that the person to whose name they were attached was a Doctor of Medicine.

The licence given by the College of Physicians in Ireland to the prosecutor, was in these terms:—"*Omnibus ad quos literæ præsentēs pervenerint salutem. Nos, Præses et Socii Collegii Medicorum Regis et Reginae in Hiberniæ (name), quum examinatione solenni, de more instituta, se doctum et rei medicæ peritum probasset, Licentiam medicinæ exerceendæ, quamdiu se bene gesserit, legibusque hujusce Collegii obtemperaverit plene quantum in nobis est permissimus, et auctoritate regiarum chartarum nobis in istum finem concessarum confirmavimus.*

"*Quod sigillo nostro communi affixo et nominibus nostris subscriptio testamur.*"

Brewster (with him Jellett) showed cause.

This conditional order cannot be made absolute; first, because no qualification, except those mentioned in the Medical Act, can be inserted in the register, and the qualification which the prosecutor seeks to have inserted is not one of those enumerated in the statute; secondly, because, even if this were a statutable qualification, the prosecutor has not got the qualification which he asks to have inserted after his name. He is a Licentiate of the King's and Queen's College of Physicians in Ireland, but that does not entitle him to add to his name the letters "M.D." as an equivalent for "Doctor of Medicine," because that imports a *degree*. His diploma has not given him a degree, even if the College of Physicians had power to grant one. The 21 & 22 Vict. c. 90, s. 14, directs the "Registrars to keep their respective registers in accordance with the provisions of this Act, and the orders and regulations of the General Council." Therefore the prosecutor requires the Registrar of the Branch Council for Ireland to violate the Act—first, by inserting on the register an illegal qualification, which, even if it were legal, the prosecutor has not got; and, secondly, by disobeying the "order" of the General Council, which, the letter of the 6th of February 1861 shows, directed the letters "M.D." to be struck out. Every qualified person is entitled, by section 15, to have appended to his name, in the register, every qualification which he has got, and which is recognised in the Act; and, in order to secure the correctness of the register, the 18th section directs the Colleges and Bodies in the United Kingdom, mentioned in schedule (A), to give to the General Council, upon requisition, all the information necessary for the verification of the claims to be registered. The prosecutor therefore is entitled to have entered on the register only some one or more of the statutable qualifications which he has actually

obtained. Schedule (A) contains an enumeration of all the qualifications in respect of which a man can be registered. The prosecutor is already registered under qualification No. 3. No. 10 includes "Doctor of Medicine"; but only when that qualification has been obtained from some University of the United Kingdom or the Archbishop of Canterbury. It is not pretended that the prosecutor has obtained a qualification from any such source, or that his case is provided for by No. 11. But the prosecutor claims to be registered as Doctor of Medicine, because the Licentiates of the King's and Queen's College of Physicians in Ireland are recognised as such in several public statutes, and are publicly called Doctors of Medicine. No doubt, the 1 Geo. 3 (Ir.), c. 14, and the 40 Geo. 3 (Ir.), c. 84, make use of such phrases as applied to those licentiates; but, when so applied, they are used either in the technical sense of possessing the *degree* of Doctor, which the prosecutor has not got, either from a University or from the College of Physicians in Ireland (supposing that body to be capable of granting a degree) or as merely titular designations or descriptions conferred by popular courtesy or general custom, and therefore not within the meaning of the Act. Nothing titular can be now inserted in the register; for, though there was, in the form given in schedule (D) of the Medical Act, a column for "title," that column has been repealed by the 22 Vict. c. 21, s. 3. Furthermore, by section 26 of the Medical Act, "no qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the Registrar be satisfied, by *the proper evidence*, that the person claiming is entitled to it." What "*the proper evidence*" is, will be found in section 15, to be specified as "*the document* conferring or evidencing the qualification, or each of the qualifications, in respect whereof he seeks to be so registered." Now the diploma, produced by the prosecutor to the Registrar, does not contain the qualification which he claims to have entered on the register, under the Medical Act; it only makes him a Licentiate of the College of Physicians in Ireland. If he chooses to obtain, in the regular way, from a University, a degree of M.B. or M.D., he can have it registered under section 30; but, until he does so, his claim cannot be conceded. His present registered qualification gives him all legal rights conferred by the statute; and the prosecutor, having but one of the qualifications specified in the Act, is not entitled to be registered, not only under that qualification, but also under others which he has not yet acquired.

J. E. Walshe and W. Smith, contra.

The conditional order must be made absolute, on two grounds:—first, before the Registrar made the original entry,

containing the letters "M.D.," he must have been satisfied by "proper evidence" that the prosecutor was entitled to have those letters affixed to his name; and, when the entry had been once made, the Registrar had no power to strike out those letters without having previously given notice to the party, so that he might appeal from his decision, under the 26th section. Therefore the Court is bound to issue the mandamus, in order that notice may be given to the prosecutor before the letters are again erased. No appeal lies from the decision of the Branch Council; so that the prosecutor has no remedy save by mandamus. If the Registrar had been dissatisfied with the evidence produced to him, and made an entry which did not satisfy the prosecutor, he would have appealed and then the entry might have been altered. But an entry, once made, cannot be altered, except after an appeal. Even the Branch Council cannot touch any entry, unless jurisdiction to do so is given to them by the bringing of an appeal. It was imperative that the prosecutor should have received previous notice (*The King v. Gaskin* (a); *The King v. The Saddlers' Company* (b)); for there is no distinction, in that respect, between the case where a man has been deprived of a right, which he had properly obtained, and the case where a man has been deprived of a right which a competent tribunal awards to him, and afterwards discovers that it has made a mistake in so doing. The prosecutor has adopted the course which was taken in *Regina v. The General Medical Council* (c).

Secondly, the College of Physicians had jurisdiction to grant the title, which was not used in the technical sense importing a degree, but merely as a sign descriptive of his being a qualified person. They have a right to attach to a man's name any form descriptive of his skill and competency; and, being a tribunal competent to do so, no other tribunal has a right to alter the description, unless there is a legislative prohibition of it. No doubt, the column of title, in the form in schedule (D), is now abrogated; but the 22 Vict. c. 21, while it repealed that column, left wholly unrepealed section 27 of the Medical Act, by the express terms of which the Registrar is bound to insert in the register "Medical titles . . . conferred by any Corporation or "University"; and the College of Physicians in Ireland has conferred upon the prosecutor the title "Licentiate and M.D." Every person is bound to recognise and adopt that title, until it is shown to be illegal. The Registrar struck out the letters in obedience to the resolution of the Branch Council of Ireland. That resolution was wholly outside their jurisdiction; and, at all

(a) 8 T. R. 209.

(b) 6 Jur. (N.S.) 1113; s. c., 30 L. J. (Q. B.) 186.

(c) [*Ante*, page 38.]

events, the Court will grant the writ, in order that the prosecutor may have an opportunity to question the decision, and have the question decided by a proper tribunal, on appeal. On that principle the Court always acts, in the similar case of a man being deprived of an office without an opportunity of maintaining his right to it. When the Medical Act, section 14, directs the Registrar to keep the "register correct, in accordance with the provisions of this Act, and the orders and regulations of the General Council," it does not mean every casual order or direction, made for a particular case, as was the case here, but refers to the general orders which section 16 directs the General Council to frame, to regulate the keeping of the registers. Also, when section 14 authorises them to make "necessary alterations in the . . . qualifications" it refers to section 30; so that no alteration of a qualification can be made under sections 14 and 30 except in addition to, or substitution for, a qualification previously registered. Counsel also argued that the letters "M.D." ought to be retained on the register, as part of the prosecutor's qualification, because the phrase Doctor of Medicine, and equivalent phrases, have been, in different public statutes as well as by general custom, applied to the Licentiates of the College of Physicians in Ireland; and that that constituted a statutable recognition of the right of that body to employ that title, though not as importing a degree (1 Geo. 3 (Ir.), c. 14; 25 Geo. 3 (Ir.), c. 42; 40 Geo. 3 (Ir.), c. 84.) Under the present qualification, as registered, the prosecutor does not possess all the rights given by the Medical Act (*Ellis v. Kelly (d)*). The prosecutor's qualification is not stated to its full extent; and, in order to give the public full information, the qualification should be stated in its full extent, and the letters "M.D." should be inserted as an essential part of that qualification, though not as a separate and distinct qualification. The Court is bound, on the present motion, to presume that the Registrar acted legally in the first instance, and therefore to assume that the prosecutor was entitled to the appellation of "M.D."; and grant a mandamus, in order that the remaining question—whether he has a legal right to it?—may be solemnly decided on the return to the writ.

Jellett, in reply.

The prosecutor says that he is entitled to the title "Licentiate of the College of Physicians" by diploma, and to the title "Doctor of Medicine" by courtesy and general usage; and is therefore entitled to have this composite qualification inserted after his name. But no qualification, save one or more of those

(d) [*ante*, page 21.]

enumerated in section 15 and schedule (A), can be inserted ; and “ Doctor of Medicine ” of the College of Physicians, or by courtesy, is not mentioned in the Medical Act. The Court cannot give to the word “ qualification ” any but the limited and defined meaning given to it in section 15 and schedule (A). It was further contended that the Registrar, having once inserted a qualification in the register, cannot afterwards alter it without first giving notice to the party ; but section 14 is imperative in its direction on the Registrars, “ to keep their respective registers correct . . . and “ from time to time make the necessary alterations in the addresses “ *or qualifications.*” It is said that the entry should be restored to its original condition, in order that the prosecutor may appeal, under section 26, after notice ; and that upon that ground the mandamus issued in *Regina v. The General Medical Council (c)*. That case was wholly different, because the prosecutor there, holding under a degree from a Foreign College, could not be registered at first without the assent of the General Council, which he obtained. The Court held that he ought to receive notice, and have an opportunity of showing cause against the charge of infamous misconduct. In that case too the prosecutor’s title to be put on the register was complete, by the decision of the General Council to admit him. But here the prosecutor never had any title to be registered as “ M.D.,” and the fact of the Registrar writing those letters after his name could not confer on him the right to be so registered ; for the Registrar acted in excess of his jurisdiction, which is strictly limited by the Act. Besides, the appeal given by section 26 is only an appeal from the decision of the Registrar, refusing to insert what is within the Act. The Court is asked to command the Registrar to make an entry which would make the register incorrect. Every such act is expressly forbidden by section 14 ; and the Court will never issue a mandamus directing a person to do an act which an Act of Parliament prohibits him from doing (*The Queen v. The Justices of Cork (e)*).

Cur. adv. vult.

LEFROY, C.J.

This case comes before the Court upon a motion to show cause against a conditional order for a writ of mandamus, which was obtained by a gentleman named Barker against

(e) 7 I. C. L. R. 249.

(*Note.*)—The affidavits in this case also raised the question, whether the College of Physicians has the right of conferring *degrees* ? This question was much debated during the argument. The Report however has been disembarassed of the facts and arguments touching that question, inasmuch as the judgment of the Court proceeded on other grounds.—REPORTER.

the Registrar of the Branch Medical Council of Ireland, "requiring and directing him, as Registrar of the Branch Council for Ireland, under 'the Medical Act,' to restore the entry in the local register for Ireland under said Act, of the name and qualification therein of the said James Barker junior, to the same state as such entry was originally made by the said W. E. Steele, as such Registrar; and that he do re-insert in the said register the letters 'M.D.,' struck out therefrom by him without authority in that behalf; or, that he enter on said register, as part of the medical qualification of the said James Barker junior, as a Licentiate of the King's and Queen's College of Physicians in Ireland aforesaid, the words 'as Doctor of Medicine,' after the word 'Licentiate,' in the column of said register entitled "qualification." In substance, the Registrar was required to show cause why he should not erase the name of Mr. Barker, as it now stands, and enter it in another form, with the prefix, or rather the addition to it, of the words "Medical Doctor," in addition to a portion of the description of qualification which was given originally. The name was entered originally as "James Barker junior, Licentiate of the K. & Q. Coll. Phys. Ireland." Afterwards, there was added to that description, by order of the Branch Medical Council for Ireland, the letters "M.D." importing "Medical Doctor." By a subsequent order of the Branch Medical Council for Ireland, acting under the authority of the General Medical Council, that supplemental addition was discharged; and the name was directed to remain as originally entered. The application now before the Court is substantially for a writ of mandamus, not merely to restore the entry of Mr. Barker's name as a Licentiate and M.D., but also as "Licentiate and Doctor of Medicine of the King's and Queen's College of Physicians of Ireland, by their diploma." I think that these are exactly the facts.

We are all of opinion that this application cannot be complied with. Our Brother O'BRIEN heard a large portion of the argument but was prevented by illness from hearing the rest of it; and therefore he does not take any part in this judgment; but, so far as he heard of the case, he was of the same opinion as the other Members of the Court who are now present, and who are very clearly of opinion, after a full consideration of the subject, that this application cannot be complied with; and that the cause shown against the conditional order should be allowed. We think that the application could not be granted consistently with the Act of Parliament under which it was made; and that, to comply with the prayer of this conditional order, would be to set aside the last legal order of the Branch Medical Council for

Ireland, and to substitute in its place an illegal order ; and we all think it will appear, from a statement of the Act (21 & 22 Viet. c. 90), that, having regard to its provisions, the effect of an order complying with this application would be what I have just stated. This Act is deserving of what, with all deference to the Legislature, I may say is a rare compliment. It is an Act drawn with peculiar accuracy. Its title is, "An Act to regulate the "Qualifications of Practitioners in Medicine and Surgery"—to regulate the qualifications, that is, the actual qualifications, which, according to this Act, will entitle them to privileges of which they were not compelled to avail themselves, but which they are at liberty under, and entitled by, this Act to avail themselves of, if they think fit ; and it will appear that the privileges of registry under this Act are of considerable importance. It may therefore very reasonably be expected that those who obtain the privileges of registry given by this Act, shall comply with its provisions ; and that persons applying in fact for the benefit of the Act shall comply with all its substantial conditions ; and its conditions are enumerated with a precision and a distinctness which can leave no doubt or question whatever on the mind of any person who reads the Act, even with ordinary care and attention ; but we have conned it over most carefully, and now entertain the opinion which I have stated. The title of the Act is what I have stated ; and the Act, at the same time that it confers benefits on the medical profession, provides for the public a most desirable advantage. That object is contained in its recital—"Whereas it is expedient that "persons requiring medical aid should be enabled to distinguish "qualified from unqualified practitioners." That is the advantage which the Act proposes to attain for the public ; we shall hereafter see the advantage given to the medical profession. The second section enacts that "This Act shall commence and take "effect from the 1st day of October 1858." We shall see hereafter how that date becomes material. By the 3rd section it enacts that "A Council, which shall be styled 'The General Council of "Medical Education and Registration of the United Kingdom,' "hereinafter referred to as the General Council, shall be established, "and Branch Councils for England, Scotland and Ireland "respectively, formed thereout as hereinafter mentioned." The Act then, by its 4th section, provides how the General Council shall be formed : "The General Council shall consist of one "person chosen, from time to time, by each of the following bodies "(that is to say) : the English electoral bodies, the Scottish electoral bodies, and thirdly (which is the material part of the section in the present case), the Irish electoral bodies ; stating

who shall form the Branch Council for Ireland thus—"One person chosen, from time to time, by each of the following bodies—the King's and Queen's College of Physicians in Ireland, the Royal College of Surgeons in Ireland, the Apothecaries Hall of Ireland, the University of Dublin, the Queen's University in Ireland"; and one person nominated by Her Majesty, with the advice of her Privy Council, and the President to be elected by the General Council. These persons are to constitute the Branch Council for Ireland. The General Council, which is to be formed of contributions from the Branch Councils of England, Scotland and Ireland, sits in England, and has a superintending, supervising, controlling and directing power over the Branch Councils. I shall now refer to such sections only of the Act as will enable us to give an effective answer to this application. It is observable that, by the 7th section, "Members of the General Council representing the Medical Corporations must be qualified to be registered under this Act." This, which is a special provision as to the representatives of Medical Corporations, is not inserted as to persons representing Universities; because persons representing Universities are persons holding of necessity under degrees; but the representatives of Medical Corporations do not hold under degrees; but they hold by their licences; and therefore there is a special provision with respect to them; and in that respect it is material to consider the indications of an intention on the part of the Legislature, with respect to the privileges given especially to Universities, that this provision is applied to the representatives of Medical Corporations; because they may or may not have degrees, which alone would qualify them to be representatives of the body, or to be registered; and this provision therefore is clearly a strong indication of the intention of the Legislature to make a distinction between Universities and Medical Corporations, as they are called in the Act. The next sections of importance are the 10th and 11th, which provide respectively for the appointment of officers to the General Council and to the Branch Councils. These officers are to be Registrars, who are to act as Secretaries and also as Treasurers, unless another person is appointed to act as Treasurer. The next important section is the 14th, which prescribes the duties of the Registrars—"It shall be the duty of the Registrars to keep their respective registers correct." How correct?—"In accordance with the provisions of this Act, *and* the orders and regulations of the General Council." They are first bound to act in accordance with the provisions of the Act; they are also bound to act under orders and regulations of the General Council; they were to erase the names of all registered persons who shall have died, and,

from time to time, make the necessary alterations in the addresses or qualifications of the persons registered under this Act; so that, if a person once registered obtains a different qualification, in addition to that under which he was registered, they shall also enter that qualification on the register; provided always that it shall be lawful for them, if they shall apply by letter to any registered person, and get no answer, with respect to his address or other particulars, within six months, to erase the name of such person from the register; “provided always, that the same “may be restored by direction of the General Council should they “think fit to make an order to that effect”; showing the superintending power of the General Council over the Branch Councils, and of course showing the legality of the acts of the Branch Councils done in conformity with the directions of the General Council. Then comes the most important section in the Act, the 15th—“Every person now possessed, and (subject to the “provisions hereinafter mentioned) every person hereafter “becoming possessed of any one or more of the qualifications “described in the schedule (A) to this Act, shall, on payment” of certain fees, “be entitled to be registered.” It is not made, as I have already observed, imperative on any medical person to be registered under the Act: but it enacts that he shall be “entitled” to be registered; and it prescribes the mode and form in which he shall be so entitled to be registered—“on producing to the “Registrar of the Branch Council for England, Scotland or Ireland, “the document conferring or evidencing the qualification, or each “of the qualifications, in respect whereof he seeks to be so registered; or upon transmitting by post to such Registrar information of his name and address, and evidence of the qualification “or qualifications in respect whereof he seeks to be registered, “and of the time or times at which the same was or were respectively obtained.” Therefore, the Registrars must be satisfied, by proper evidence, of the qualification, “as contained in the “document” produced to them; and, if a party gets any further or new qualifications, he may in like manner have them entered on the register, upon duly producing to the Registrar the document stating that qualification. The next thing of importance is the schedule (A), referred to in that section; for it is the schedule which provides the qualifications in respect of which any person can claim to be registered under this Act; and from the schedule it appears that being a Fellow or a Licentiate of the King’s and Queen’s College of Physicians of Ireland are two of the qualifications which entitle a party to be registered for Ireland. But to be registered how? According to the statement in the document evidencing the qualification, and produced to the Registrar.

But the schedule afterwards proceeds to add further qualifications which will entitle a Physician to be registered for Ireland, "Doctor, "or Bachelor, or Licentiate of Medicine, or Master in Surgery of "*any* University of the United Kingdom." That is a further title which, for England, Scotland or Ireland, will, besides being a Fellow or Licentiate of a Medical Corporation, entitle a man to be registered. Thus, there is a marked distinction taken between a "Doctor or Bachelor" of Medicine which is a degree, and a "Licentiate"; because, although Medical Corporations cannot grant a degree by which a party can be entitled to be entered in the register under his diploma, as a "Doctor of Medicine," they may give a licence which entitles the party to be registered as a Licentiate of Medicine. But the distinction between such licences and degrees conferred by a University is here taken, in the most distinct manner, by "Licentiate of Medicine" being also enumerated here as a qualification which Universities can give, besides the qualifications of Doctor and Bachelor of Medicine by degree; but the College of Physicians, which has not that privilege, cannot give a degree which will entitle a party to be entered on the register under this Act. If we are to abide by the terms of this Act, and by the distinctions taken in the schedule which is to regulate the application of the Act, they cannot give the degree of Doctor of Medicine, nor entitle the persons to anything further than a licence, which does not import (as is evident from the distinction taken by this schedule) the privilege of a Doctor of Medicine, or Bachelor of Medicine. Then comes this further enumeration of qualifications, marking also the distinction I have already adverted to—"Doctor of Medicine, "of any Foreign or Colonial University or College, practising "as a Physician in the United Kingdom before the 1st day of "October 1858, who shall produce certificates to the satisfaction of the Council of his having taken his degree of Doctor of "Medicine, after regular examination; or who shall satisfy the "Council, under section 45 [46] of this Act, that there is sufficient "reason for admitting him to be registered." This relates to a person who had been antecedently practising under a degree of a Foreign University or College.

Having thus referred to that schedule, which is an index to point out exactly the qualifications which alone will entitle any person to be legally registered, and to have the benefit of a registry under this Act, the question then arises whether, in the present case any of these qualifications have been laid before the Court? But, before I proceed to apply the Act, I think it right to refer to some other sections of it. The 18th section enacts that "The several Colleges and Bodies in the

“way of addition to a registered name, unless the Registrar be “satisfied by the proper evidence that the person claiming is “entitled to it.” The Registrar must be satisfied by the proper evidence, which, as I have already said, is the document produced to him under the 15th section; which document must contain a qualification conformable to some one of the qualifications mentioned in the schedule. And then here are negative words in the 26th section, that the Registrar shall not enter any person’s name on the register who does not satisfy him, by a document produced, that he has a qualification such as is required by the Act. The 26th section then goes on:—“And any appeal from the “decision of the Registrar may be decided by the General Council, “or by the Council for England, Scotland or Ireland (as the case “may be): and any entry which shall be proved to the satisfaction “of such General Council or Branch Council to have been “fraudulently or *incorrectly* made may be erased from the register “by order in writing of such Council or Branch Council.” The phrase “or *incorrectly* made” at once puts an end to one of the arguments used here, that no authority could be found in the Act for the order of the Branch Council to erase the letters “M.D.” The erasure of those letters was made by the order of the Branch Council of Ireland; and in this section we find explicit authority to make that order. In pursuance of that order, the Registrar erased the name altogether. Finally, it is said that that erasure was made without notice to Mr. Barker. Now, although it is going a little out of the way to take up that point at this stage, I will do so. It is quite evident that this was a patent objection, to which no evidence could be applied any other than that of the document itself, which was produced to the Registrar, and by which he was to ascertain whether there was a qualification agreeable to the provisions of the Act. That was a matter patent upon the face of the document. Either right or wrong, the schedule of the Act, and the document produced to the Registrar, when compared together, at once decided the question. There was no possibility therefore for the question being varied by any evidence *dehors* the document and the Act of Parliament; and therefore the case which was cited (c) where Mr. Organ, upon an imputation of infamous conduct, in a professional respect, had his name erased without notice, was decided upon a collateral ground of matter of fact, and does not in the least apply here, where there was no ground whatsoever for giving Mr. Barker notice. The Act is imperative that, if the document produced does not comply with the Act, the name shall be erased. Therefore, the argument founded on the case of Mr. Organ, is entirely inapplicable to this case.

I am now to mention the benefits which result to the medical body. The benefit of registration I have adverted to, so far as relates to the public, from the opportunity thus afforded to them of knowing and ascertaining that the persons so registered have the qualifications which entitle them to the confidence of the public. On the other hand, there are some special benefits given to the persons who are registered. They are entitled to bring actions for the recovery of their fees, with a power to the College of Physicians to inhibit the members of their body from bringing an action if they think fit, and so leaving the remuneration a *quiddam honorarium* if they chose. But no medical person is eligible to serve under public boards, who shall not have been registered under this Act. These are some of the benefits given to the medical profession; and as they are an inducement, no doubt, to persons to register themselves, so it is, on the other hand, of great value to the public that the qualifications should be ascertained strictly and accurately, according as the wisdom of the Legislature prescribed should be necessary to obtain the benefits conferred by this Act. One of the matters which were urged upon us was, that the present applicant has a diploma of licence from the College of Physicians. But that is not one of the qualifications mentioned in schedule (A). A licence or a degree from the University are mentioned; but the very circumstance that the degree of Bachelor or Doctor of Medicine is considered and treated separately from a licence; or that the degree of Bachelor or Doctor of Medicine is distinguished, when given by a University, from a Licentiate; is a circumstance also quite decisive to show that, although a University may make a party a Licentiate, yet also it shows that the circumstance of a party being a Licentiate of any other body, not being a University, cannot confer the privilege of a degree. This gentleman therefore, having nothing but a licence, a diploma, to practise medicine generally, from a body not being a University, and not having the degree of a University, is not entitled to be entered on the register in the manner in which he claims to be entered; for he does not come within any one of the qualifications entitling him to be so registered. The circumstance that he may have imputed to him publicly and generally the appellation of "M.D." I have already adverted to. It cannot entitle him to be registered as "M.D.," for it is but an empty title, if I may so say. Then he desires that he may be entered as a Licentiate of the College of Physicians; and that there shall be entered and appended to the entry of his name the letters "M.D.," that is to say, that he shall be entered on the register as Doctor of Medicine. There is no such privilege given by schedule (A) to a person who has

merely a licence from the College of Physicians. He says that there is now a form of diploma which would entitle him to that privilege. But suppose that there be so, and that the College of Physicians has a right to grant a degree of Doctor of Medicine, yet they have not granted it to Mr. Barker. He has not brought before us any document substantiating any right whatsoever to the qualifications which he seeks to have entered. And, even though he may have the degree, and the College of Physicians had the power to grant it, it would not entitle him to have this order made absolute; because the Act is imperative that the document produced to the Registrar, and of course the document produced to us, must contain some one of the qualifications which are mentioned in schedule (A). We cannot make for Mr. Barker an Act of Parliament; nor can we for him travel out of the Act made by the Legislature. We are all bound—the Court is bound, the Registrar is bound, the Branch Council is bound—by the special and distinct provisions of the Act, that no man shall be registered under this Act, except according to the qualifications contained in the document brought by him to the Registrar, and which must contain some one or more of the qualifications mentioned in the schedule. Nothing can be more explicit, distinct, or imperative. There are negative words in the 26th section, words negating any title whatsoever, except that which accords with the Act and the document complying therewith, which should be produced to the Registrar. Here there is no such qualification. The party comes to ask us to direct the Branch Council for Ireland to direct their Registrar to add to the entry in the register something which is neither in the document brought before him, or produced to us. It is impossible to comply in any such case with the application. The applicant fails to produce the primary qualification. A titular qualification will not do: and for us to make a qualification for him is impossible.

Perhaps it is unnecessary for us to say anything upon the subject of the claim of the College of Physicians to grant degrees. It is wholly unnecessary for our decision; and therefore, perhaps, we are not to be understood to pronounce peremptorily an opinion on that subject. We leave it open for them to have it discussed, if anything should occur to make further discussion upon it desirable. But, even if they had the power to confer degrees, they have not given a degree in this instance. There is no degree conferred by the document produced here; and therefore, we need not unnecessarily decide that question. We do not desire to go out of our way to decide it. Whatever impression we may have upon that subject, it has not been the turning point of the

case ; and therefore, we are not to be considered as concluding the parties by anything that passes now on that subject.

The only remaining topic is that argument which was attempted to be founded upon two Acts of Parliament, the 1 Geo. 3, (Ir.) c. 14, and the 40 Geo. 3, (Ir.) c. 84, in which, for the purpose of ascertaining certain matters in certain localities, a Licentiate of the College of Physicians is treated as and called a Physician. He is in those Acts treated and mentioned along with those who have the regular qualifications of Doctor of Medicine ; that is, there is intrusted to him generally, the discharge of the same duties as a Physician is called upon to perform. That decides nothing as to the species ; they are all Physicians : that is the name of the genus. But the species is here in the present Act, the class which was distinctly separated, so that we cannot, on that account, consider that as a legislative conferring of a degree. But, be that as it may, here is an Act which does not enumerate a degree conferred in that way ; and there are no degrees recognised in it, except those of Universities. Indeed, in the course of the argument, my Brother HAYES took up that topic, and sifted it so closely and accurately that it would be quite unnecessary to add anything further now upon that point. Upon the whole, therefore, it appears to us, and so far as my own opinion goes, it appears to me for the reasons which I have on my own behalf stated, that the cause shown must be allowed.

My Brethren will add to the reasons which I have stated, anything further which may occur to them ; but we are all of opinion that the application to make this conditional order absolute must be refused.

HAYES, J.

I concur with the other Members of the Court in thinking that the cause shown against the conditional order of the 3rd of May 1861, for a mandamus, ought to be allowed.

Two points were made by Mr. *Walshe*, in argument :—

First :—That the prosecutor having been regularly registered, the Branch Council had no authority to interfere with that registration, save upon due notice to him ; and that on account of that illegality, and altogether irrespective of merits, the mandamus ought to go. And, secondly ; he contended that the College of Physicians had a right to grant the title of “ M.D.”—not a degree in the ordinary sense of that term when we speak of University degrees, but in a certain popular sense in which the term has been understood, when applied to Licentiates of that College, as distinguishing them from Practitioners in Midwifery.

It appears that Mr. Barker, having been registered as “ Lic. M.D., K. Q. Col. Phys. Ireland,” Dr. Steele, the Branch

Registrar for Ireland, in obedience to a resolution of the Branch Medical Council, expunged the letters "M.D." without having given any notice of that proceeding to Mr. Barker. And the conditional order is to restore the entry in the local register to its original state; and that the Registrar shall re-insert in the register the letters "M.D." which were so struck out by him; or that he enter, as part of the Medical qualifications of James Barker junior, as a Licentiate of the King's and Queen's College of Physicians, the words "as Doctor of Medicine," after the word "Licentiate."

Upon the first point it has been strongly pressed upon us that, whatever may be the merits of this case, injustice has really been done to this gentleman, by a decision having been come to, in his absence, which materially affected his interests—that the Registrar being, by the Medical Act, charged with certain judicial functions, as to the entry of qualifications on the register, with a right of appeal to the Branch Council under section 26, the Registrar ought not to have proceeded, without giving due notice to the party affected; and having failed to do so, and that to the prejudice of the prosecutor, this Court ought now to interfere by issuing its mandamus to replace his name, and thus leave matters to be inquired into, and dealt with in their statutory course. I entirely agree with Mr. *Walshe*, that such is the course we ought to adopt, if there were really anything to be inquired into beyond the matter of law which we have now before us for decision. But if there has been suggested to us no real question of fact to be determined, and if there is no question of law, save that which is mooted to us in argument on the present motion, it would be against all principle and practice to grant a mandamus on such a ground. Why should we order that to be done, which we clearly see must be afterwards undone? Perhaps the Registrar may have been under no legal obligation to obey the commands of the Council in making the alteration complained of; but if the command was to do an act which in itself was strictly legal, the maxim "*Factum valet, quod fieri non debet*" at once applies, and forbids an interference.

The case of *Reg. pros. Dinsdale v. The Saddlers' Co.* (f) is strongly corroborative of this view. Mr. Dinsdale had there been admitted to an office of trust in the Corporation, upon a representation of his entire solvency; he soon afterwards became bankrupt, his estate paying 2s. 8d. in the £1. There was a law prohibiting the admission of a bankrupt or insolvent. He was expelled without notice given to him. A mandamus issued to restore him; a return was made alleging the bye-law and the

insolvency, neither of which was traversed. The questions argued were, as to the validity of the bye-law, and as to the expulsion without notice. On the latter point, MARTIN, B., in pronouncing judgment, says :—" We should be very slow to allow the present writ of mandamus to issue, ordering the restoration to office of a person not qualified to hold it or to discharge its duties, who ought never to have been elected, and who never would have been elected, but for a mistake of fact on the part of the electors."

As to the second question, I am of opinion that the prosecutor has failed to show any title whatever as a Licentiate of the King's and Queen's College of Physicians, to use the title of Doctor of Medicine; and even though he had established that, he has failed to show any right to have that title inserted on the register.

The object of the Legislature in passing the Medical Act was, as stated in the preamble, " To enable persons requiring medical aid to distinguish qualified from unqualified practitioners." And for this purpose the statute selects certain Colleges or Schools of Medicine, to one or other of which all medical practitioners, in order to entitle themselves to the benefit of the Act, must belong. These Schools or Colleges are to a certain extent, placed under the surveillance of the Medical Council; so that if in process of time the course of education should degenerate in any of them, the matter may, after due inquiry by the Medical Council (section 20), be referred to the Privy Council, by which last mentioned body the retrograding School or College may be debarred the privilege of sending its members for registration (section 21).

But while the several Schools mentioned in the Act shall preserve their status, all persons who have obtained the rank in those Schools which is specified in the statute shall, on payment of the statutory fee, be entitled to be registered; which is to be effected by insertion on the register, of their names, residences, and qualifications. It is true that by the Medical Act, it was allowed that " medical titles " should also be set forth on the register; but by the Act of the 22 Viet. c. 21, this last provision was repealed, so that now the name, residence, and qualification alone are to be registered. And by the express words of the 15th section of the Medical Act, it is only in respect of some " one or more of the qualifications, described in schedule (A)," to the Act, that the party is to have the title to be registered. On referring to schedule (A), the only qualification belonging to the College of Physicians is " Fellow or Licentiate of the King's and Queen's College of Physicians of Ireland "; and therefore, it is only as such Fellow or Licentiate that any person can, in respect of his connection with this body, show any right to registry. And no matter how well founded the rights of those gentlemen may be

to assume any other titles or honorary distinctions, yet since the passing of the 22 Viet., titles are not to be registered; and the only qualifications to be registered are those specified in the schedule.

Now, I take this to be a complete answer to the present application. But as it has been strongly pressed in argument that Licentiates of the College of Physicians are entitled to the appellation of Doctors of Medicine, and therefore have a right to the insertion of this on the register as a part of their qualification, I shall venture a few words on the subject. It appears to me that this title of "M.D.," though it may be one very generally used by, and applied to, Licentiates of the College of Physicians, is one to which those gentlemen, *as such*, have no right. Those initial letters "M.D.," have been introduced and used for the purpose of conveying, and have been long understood as conveying, that the party has obtained the degree of Doctor of Medicine from some University competent to bestow it. And if we were, by our decision, to countenance the use of those letters by persons who had not so obtained the degree of Doctor of Medicine, we would be giving a legal sanction to what was in fact a usurpation. It is true that Mr. *Walshe* disclaims the use of those terms in their strict sense, as applied to University graduates, and seeks to invest them with a general and popular signification; but what right have we thus to misapply the terms, and, where called on to expound an Act made for the registry of medical practitioners according to their legal qualifications, to contravene the plain object and policy of the Act, by allowing parties to assume a designation to which they are not legally entitled, and thus to be active, though secondary, agents in the misleading of those for whose assistance the statute was enacted? And possibly it may have been some consideration of this kind that led to the repeal of the column as to titles. Perhaps the Legislature may have thought that the insertion of high-sounding titles, which, in the matter of medical skill, might be but "*vox et præterea nihil*," would tend rather to mislead than to guide the inexperienced inquirer.

In support of the right of the College of Physicians to grant, and of its Licentiates to assume, this designation of Doctor of Medicine, the Charter of the College and its diplomas have been referred to, as well as several Acts of Parliament, in which persons connected with the College of Physicians have been uniformly designated as "Doctors." I do not find in the Charter any authority whatever to grant any "degree in medicine," as that phrase is understood. It is true that that instrument recites an intention that an apt, proper, and legal Constitution and Corporation may be made and established, of grave, learned, able, and experienced

“Doctors” and Practisers in Physic in Ireland; and grants that some fourteen persons, therein mentioned, and “all Doctors in “Physic,” shall be incorporated by the name of “The President and Fellows of the King’s and Queen’s College of Physicians in “Ireland”; but, as I have said, no authority is given to confer degrees, but only to give licences, admittances, approbations, and allowances, to act as Physicians or Practisers of Physic. And the Charter takes care, in its 28th and 29th sections, to make special distinction between such Licentiates and the Graduates in Physic of a University. In strict conformity with this view of the law is the diploma which has been given to the prosecutor, and which is the one that has been in common use until the year 1859, and after the commencement of the Medical Act. That instrument, after reciting that the party had, upon examination, proved himself to be “*doctum et rei medicæ peritum*,” goes on to invest him with “*Licentiam medicinæ exercendæ, quamdiu se bene gesserit*.” No doubt, in the year 1859, an alteration was introduced into the form, but that can have no effect in the consideration of this case. The Act of the 1 Geo. 3, c. 14, has been cited, as a legislative recognition of the right of Licentiates to the appellation of “Doctor,” because the statute speaks of the College having power to admit into the fellowship of their body “such and so many other learned “and worthy Doctors of Physic” as the President, Censor, and Fellows should from time to time judge necessary.

Now, it appears to me that any argument as to right and title, which rests on the circumstance of a casual designation occurring either in a Charter or Act of Parliament, is not deserving of very serious consideration; but certainly its weight and importance, small as they may be, are wholly annulled when we are informed that, in the year 1695, a bye-law was passed by the College of Physicians, which required that every person, before being admitted a Fellow of that College, should be first admitted a Doctor of Physic in the University of *Dublin*; and that this bye-law continued in full force at the time of the passing of the Act of the 1 Geo. 3, as appears from the date of a document (15th Feb. 1761) referred to in the course of the argument, being a letter from the College of Physicians to the University of *Dublin*, threatening to admit other persons than those authorised by the bye-law of 1695.

The School of Physic Act (40 Geo. 3, c. 84) in its 15th, 19th, 20th, 42nd, and 45th sections, draws a marked distinction between those who have taken medical degrees and persons who have obtained a “licence to practise” from the College of Physicians. Being therefore of opinion, upon the facts, as appearing before us in the affidavits and other documents, that

the College of Physicians has no legal authority to grant the degree of Doctor of Medicine, or to authorise the use of any such designation or title—that Licentiates of the King's and Queen's College of Physicians, though Physicians, and entitled to practise physic, have, as such Licentiates, no right to assume the title of "M.D." or Doctor of Medicine, however it may from courtesy have been conceded to them; and, even though it were otherwise, that no such designation is specified in the statute as a qualification of those who are Licentiates of that body, I think that the cause shown against the conditional order ought to be allowed.

FITZGERALD, J.

I concur in the conclusion at which the other Members of the Court have arrived. Upon the first question, as to the point of form of the conditional order, I clearly expressed my view during the argument that if we are satisfied, upon the question of law, that Mr. Barker is not entitled to have the letters "M.D." appended to his name, we ought not now to grant a writ of mandamus to add the letters "M.D." to the entry in the register, when we would be obliged immediately afterwards to command, by another writ of mandamus, that the same letters should be expunged from the same register.

Upon the main question, I wish only to state that I found my judgment on the Medical Act, and on it alone. I do not think it necessary, for the purpose of the present motion, to express any opinion as to the question whether the College of Physicians have power to grant a degree. I found my judgment on the Act of Parliament; and it is sufficient to say that the document produced on the part of the applicant, even if the College of Physicians had power to grant a degree, is not a degree. My opinion on the case is expressed in two sentences. The applicant is a Licentiate of the King's and Queen's College of Physicians in Ireland; and he is no more; he has been registered as such with the definition given by the statute; and he is not entitled to be registered in any other way. Those are my simple and narrow reasons. As one of the public, I may add that the complaint did appear to me to be founded upon an apprehension which was shadowy in the extreme. I understood that Mr. Barker pressed on us, as a reason why we should grant his application, that he, by reason of the omission of the letters "M.D." after his name on the register, fell in public estimation. I, as one of the public, say that we rather come to the conclusion that, in reference to the qualifications of a party, there could scarcely be a higher testimonial of fitness than the certificate of the King's and Queen's College of Physicians, couched in the terms of the twenty-seventh and twenty-eighth clauses of

their Charter, that the party having been examined, tried and proved, has received their testimonial that he is an able, learned and qualified person; and their licence to practise medicine. In my estimation, that licence is, for the purpose of practising physic in this country, a testimonial of the highest character; and we, the public, never go on to consider whether he has a strict legal right to append the letters "M.D." to his name or not; he is a Doctor of Medicine in public estimation, and well learned in medicine, and entitled to practise as such.

THISTLETON v. FREWER

1861. June 10.

[31 L. J. (Ex) 230]

Statute, Commencement of—The Medical Act (21 & 22 Vict. c. 90)—Performance of Operation.

The Medical Act (21 & 22 Vict. c. 90.), s. 32 (as amended by subsequent Acts) does not apply to an action commenced before but tried after the 1st of January 1861.

Quære—whether the application of galvanism by a galvanic operator is the performance of an operation within the Act.

" Declaration—for money payable by the defendant to the plaintiff for galvanic operations performed by the plaintiff to and upon the defendant, and another person for the defendant at his request, and for materials and electric fluid by the plaintiff provided for and used in the said operations for the defendant at his request, and on accounts stated.

Plea, never indebted and payment.

At the trial, before CHANNELL, B., at the Middlesex Sittings in Easter Term, 1861, it appeared from the particulars of the plaintiff's demand, that the action was brought by the plaintiff, who described himself as a "mechanical operative galvanist," to recover a balance of £25 8s. for "galvanic operations" performed on a lady, at the defendant's request, between October 1858 and May 1859. The action was commenced in December 1860. The plaintiff, who said that he had carried on his business or profession in London for ten years, described his treatment as consisting in the local application of the galvanic wires to diseased parts of the body; that he sometimes operated under the advice of medical men and sometimes on his own account, as he had sufficient knowledge of the muscular system to direct the applica-

tion of the current. He supplied and administered outward lotions made up by him; but did not charge for them, or for medicated baths which formed a part of the treatment, and which he supplied to patients attending at his house. His charge was one guinea at his own house, and two guineas for attending persons at their houses. He stated on cross-examination that he was not registered under "the Medical Act," as he did not profess to be a medical man. A pamphlet was put into his hands, which he admitted was issued by him. It was entitled "*Modern Remedies versus Professional Prejudice, embracing Observations on the Past and Present State of Medical Science.*" Together with some "recent modes of cure, more especially his newly-discovered process of frictional absorption, by J. M. Thistleton." After a depreciation of existing medical science and of the faculty, and an eulogium on Homœopathy, Hydropathy, Mesmerism and Herbalists, the author proceeded—"The foregoing schools and remedies, however, were mostly revivals or adaptations of the processes of other ages, and may be considered rather as restorations of the beneficent simplicity of purer times than aboriginal discoveries. But, in addition to these, modern science has developed healing resources peculiarly its own. Such are the inhalation of gases in their various combinations and proportions, and the application of imponderable forces, more especially that of galvanism, to the human frame. . . . Among the medicated agencies which the progress of medical science has introduced, we may here mention the use of baths, not only of various degrees of temperature, regulated, of course according to the constitution and requirements of the patient, but also composed of such ingredients as may, by absorption through the pores of the skin, act powerfully and penetratingly on the blood and humours." The author subsequently proceeded: "to a more detailed specification of his latest medical discovery, namely, the absorption of refined chemical and herbal agencies through the skin, promoted by friction, and assisted when this appears to be necessary, by electro-galvanic currents, conducted through the rubbers, and thus ensuring a unique combination of mechanical, chemical and vital action. . . . By these means, either separately or in combination, he has been enabled to remove every class of nervous diseases, tremor, (&c.) They are the slowly and carefully elaborated effects of many years' varied and extensive medical practice, combined with anatomical, chemical, and other scientific knowledge. The object of Mr. T.'s study being to unite the various remedial agencies, which he has found so effective separately, into one grand and resistless process, under which disease would, in all possibly curable cases, be compelled to succumb. This he flatters himself he has now accomplished."

It was objected that the plaintiff could not recover, not being on the Medical Register, as required by the Medical Act (21 & 22 Vict. c. 90).

The learned Judge reserved the question, but left it to the jury to say whether the plaintiff was acting or holding himself out as a medical man, that is to say, as a physician, surgeon or apothecary, and whether the medicine supplied was supplied in that capacity or either of them, or as a means of making the galvanic fluid more effectual. The principal questions of fact in dispute were whether the defendant had employed the plaintiff, and whether the contract was "no cure, no pay," the lady, who suffered from a disease of the skin, not having been cured, but, on the contrary, as alleged by him, her complaint was rendered worse by the treatment.

The jury having found in favour of the plaintiff, on the points left to them, a rule was obtained to enter a nonsuit, on the ground that the cause of action was within the operation of the Medical Act, or for a new trial, on the ground that the verdict was against the evidence.

Huddleston showed cause.—The case is not within the Medical Act (21 & 22 Vict. c. 90). This is nothing more than the application of galvanism in combination with baths. But it is unnecessary to consider this question, as the Medical Act does not extend to this case. Section 32 enacted, that after the 1st of January 1859, no person "shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act." The 22 Vict. c. 21 substituted the 1st of July 1859 for the 1st of January, but the 23 & 24 Vict. c. 7 altered it to the 1st of January 1861, a date subsequent to the commencement of the present action—(He was then stopped).

Gibbons, in support of the rule.—The section refers to the recovery and proof at the trial, intending that no unqualified person shall have the assistance of the law after the 1st of January 1861 (*Haffield v. Mackenzie* [*ante*, page 10]).

(CHANNELL, B.—The only question is, whether the section applies to an action tried after it comes into operation, for work done before. The rule is not to construe an Act retrospectively where such a construction will take away a vested existing right, unless in cases where mere procedure is involved, as in the recent case of *Wright v. Hale* (a).)

POLLOCK, C.B.—It is unnecessary to consider the question raised at the trial, as it appears the action was brought before the

1st of January 1861, the extended time for the application of section 32 of the Medical Act. The rule must therefore be discharged.

MARTIN, B.—The jury have found that the plaintiff did the work on a contract to be paid for it by the defendant. The defendant says the work done was illegal, and he relies on the 32nd section of the Medical Act. But that Act, as amended by subsequent Acts, does not apply, for here the work was done and the action commenced before the 1st of January 1861. The defendant, therefore, has failed to show that the work was illegal, and the consequence is the plaintiff is entitled to recover for it. But for the extension Act I think it would have been impossible to hold that this was not a case within the statute.

CHANNELL, B.—I decline to give my opinion whether the case at the trial supported the point then made. But our attention being now called to the Act amending “The Medical Act,” I think the point is not open to the defendant.

Rule discharged.

WRIGHT v. GREENROYD

1861. Nov. 21.

[31 L. J. (Q. B.) 4]

Medicine and Surgery—Qualification of Practitioners—Register—Statute 21 & 22 Vict. c. 90, s. 32, Retrospective operation of.

Held, that section 32 does not apply to an action in respect of work done before the 1st of January 1859.

This was an action brought in this court, but sent down to be tried in the county court at Halifax.

The declaration was for work and attendance done by the plaintiff as a surgeon and apothecary, in and about the healing and curing of the defendant and his family, and for medicine, &c., provided and administered to the defendant and his family at his request. There was also a count upon an account stated.

The defendant pleaded that he was never indebted. Issue joined.

At the trial, it was objected, on behalf of the defendant, that the plaintiff could not recover without proving that he was registered under the 21 & 22 Vict. c. 90, the Act regulating the qualifications of practitioners in medicine and surgery. It appeared that the whole of the work and medicines, in respect of which the action was brought, was done and were supplied before the passing of the Act, but the learned Judge, being of

opinion that it was absolutely necessary to produce a copy of the Medical Register, nonsuited the plaintiff.

A rule was subsequently obtained in this court, calling on the plaintiff to show cause why the nonsuit should not be set aside, and a new trial had, on the ground that it was not necessary to produce the qualification of the plaintiff.

Manisty showed cause.—The nonsuit was right. The 21 & 22 Vict. c. 90, s. 15 provides that any person possessing any one of certain specified qualifications shall be entitled to be registered. By section 27 the register is to be called “The Medical Register,” and a copy purporting, &c., shall be evidence in all courts. Section 32 is positive, and prevents the recovery in any action of this kind unless the provisions of the section are complied with.

(COCKBURN, C.J.—Suppose the case of a person who has carried on business as a medical man, but has retired from business before the passing of the Act; if he subsequently brings an action for the work which he has done, can it be necessary that he should show that his name is on the register? I cannot help thinking that the section only applies to work done subsequently to the passing of the Act. BLACKBURN, J.—According to the maxim, “*Nova constitutio futuris formam imponere debet, non præteritis*,” it would seem that the statute would not apply to such a case.)

Maule, in support of the rule, said that the point had been already decided in the Court of Exchequer (a).

Per Curiam—The rule must be made absolute.

Rule absolute (b).

TURNER v. REYNALL

1863. April 28.

[14 C. B. (N.S.) 328]

Reported also :

32 L. J. (C. P.) 164 ; 8 L. T. 281 ; 3 Jur. (N.S.) 1077 ;
11 W. R. 700.

A medical practitioner is entitled to maintain an action for attendances and medicine, though not registered at the time of such

(a) *Thistleton v. Frewer* [ante page 66].

[(b) The Acts of 1859 and 1860, postponing the day appointed by section 32 until 1st January 1861, do not seem to have been referred to. It was not necessary to the decision to do so, as the attendances were given and the medicine was supplied before the earlier date.]

attendance under the 21 & 22 Vict. c. 90; it is enough if he appears to be duly registered at the time of the trial.

And, where a business is carried on by two partners, one of whom is registered as a surgeon and apothecary, and the other as a surgeon only, this is no answer to a joint claim for attendances and medicine supplied in both capacities.

Semble—per ERLE, C.J.—that it would be enough if one member of the firm only had been registered (a).

This was an action for work and materials, money paid, and goods sold and delivered. Plea, never indebted.

The cause was tried before BYLES, J., at the second sitting in London in Hilary Term last. The facts were as follows:—Turner and Smith carried on in partnership the profession of surgeons and apothecaries. Turner was a duly qualified surgeon and apothecary, and was registered as such in the year 1859, under the 21 & 22 Vict. c. 90, s. 15. Smith, who was admitted a member of the College of Surgeons on the 1st of July 1861, but was not registered under the statute until the 29th of January 1863, and then as a “surgeon” only, became a member of the firm on the 29th of September 1861. The claim in the action was for medicine and attendance from July 1861, the attendances being, with the exception of three or four for galvanising the defendant’s wife (b) and syringing her ear, all attendances by both partners in the character of apothecaries. The entire claim was £59 9s. 6d.

On the part of the defendant, it was submitted, that, to entitle the plaintiffs to maintain the action, it was incumbent on them to show that they were both duly registered under the 21 & 22 Vict. c. 90 at the time the attendances were given and the medicine supplied, and, further, that, one of the partners being registered as a surgeon only (assuming that a subsequent registration would do), it was not competent to him to join in an action for attendances and medicines supplied as an apothecary. The cases of *Allison v. Haydon*, 4 Bing. 619, 1 M. & P. 588, 3 C. & P. 246, and *Wagstaffe v. Sharpe*, 3 M. & W. 521, were referred to.

On the other hand it was insisted that a registration at any time before the trial was sufficient; and that it was enough that one member of the firm was qualified by registration to act as an apothecary.

[(a) The words of the Chief Justice are at page 74 *post*. It is not quite clear that this was his meaning and in any case his remarks were not essential to the decision of the point before him. See on this subject, Introduction, pages xxvi and xxvii *ante*.]

(b) As to galvanising, see *Thistleton v. Frewer* [*ante*, page 66].

The learned judge ruled that the registration was sufficient to entitle the plaintiffs to maintain the action; and he directed the jury to find for the plaintiffs in respect of the attendances and medicine supplied since the 29th of September 1861,—reserving leave to the defendant to move to enter a nonsuit or a verdict, if the Court should think his construction of the statute erroneous; all necessary amendments and certificates to be made and given, and the defendant consenting to be bound by the decision of this Court.

Petersdorff, Serj., and *Garth*, now showed cause. The case of *Haffield v. Mackenzie* [*ante*, page 10] is a distinct authority to show that the 32nd section of the 21 & 22 Vict. c. 90 is complied with by proof that the plaintiff is a duly registered medical practitioner at the time of the trial. In *Wright v. Greenroyd* [*ante*, page 69], it was held that that section had not a retrospective operation. And the like was held in *Thistleton v. Frewer* [*ante*, page 66]. Consequently,—the date mentioned in the 32nd section of the 21 & 22 Vict. c. 90 being by the 23 & 24 Vict. c. 7 extended to the 1st of January 1861—the plaintiffs must in any event be entitled to recover in respect of all charges anterior to that date. The main question, however, is, whether Turner being registered as an apothecary, and Smith as a surgeon only, they can properly join in an action to recover for attendances and medicine supplied in the former character. (BYLES, J.—If they cannot, no surgeon and apothecary can carry on business in partnership at all. WILLES, J.—Brokers cannot act in the city of London unless duly admitted (*Cope v. Rowlands*, 2 M. & W. 159). Suppose one member of a firm is admitted as a broker, could the firm sue for brokerage fees? (c).) The 32nd section merely says that the party shall be registered, but does not say how. (BYLES, J.—Are there any penal consequences attached to non-registration, beyond the inability to sue?) The only consequences are those mentioned in section 36 [and 37].

David Keane and *Cole*, in support of the rule. The Court will hardly give its adhesion to the decision of the Irish Exchequer in the case of *Haffield v. Mackenzie*. The whole policy of the statute evidently was, to secure the proper line of demarcation between the three branches of the medical profession, and that none should intrude into its practice but such as are properly qualified. (KEATING, J.—The preamble shows that the main intention was, to enable persons requiring medical aid to distin-

(c) In the case of a broker, there is no legislative provision prohibiting him from forming a partnership with an unqualified person, as there is with respect to attorneys: see 6 & 7 Vict. c. 73, s. 32, and the case of *Tench v. Roberts*, 6 Madd. 145, a decision upon the 11th section of the repealed statute 22 Geo. 2, c. 46.

guish between qualified and unqualified practitioners generally.) Reading the 40th section with the preamble and the 32nd section, it is plain that the object of the statute was to enable the patient, and not the judge and jury at the trial, to see whether or not the party proposing to attend him is duly qualified, and what the nature of his qualification is. If the mere production of a certificate at the trial be sufficient to entitle the plaintiff to recover, an unqualified person might go on for six years, and then sue for his attendances in the meantime. The 15th section shows that the registration is to be in respect of a particular qualification. And by section 31 the party is to be entitled to practise "according to his qualification." Can two men, one of whom is only qualified to act as an apothecary, and the other only as a surgeon, each enable himself virtually to practise in both capacities, by uniting themselves in partnership? (BYLES, J.—How is this bill to be recovered? Must they wait until both are dead, and then let the executor of the survivor sue? Or, suppose Smith had become bankrupt, and his assignees and Turner sued,—the one who had sinned against the statute being got rid of, would that be an ill-constituted action? WILLES, J.—Or, suppose Smith, who is registered as a surgeon only, were the survivor,—could his personal representative sue for charges for attendances as an apothecary?) If the defendant's argument is well founded, Turner might have brought the action alone. (BYLES, J.—I must confess I see nothing in the statute to make it illegal for two parties in this position to agree to join in partnership, the one giving his attention to the general practice, the other to the surgical cases.) The want of a certificate under the Apothecaries Act (55 Geo. 3, c. 194) was always ground of nonsuit, and need not have been pleaded specially (*Morgan v. Ruddock*, 4 Dowl. P. C. 113; *Shearwood v. Hay*, and *Wills v. Langridge*, 5 Ad. & E. 383, 6 N. & M. 831; *Wagstaffe v. Sharpe*, 3 M. & W. 521). The words of the 55 Geo. 3, c. 194, s. 21, were, that "no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to the 5th of August, 1815, or that he has obtained a certificate to practise as an apothecary from the Master, Wardens, and Society of Apothecaries." There is no substantial difference between the language of that statute and that of the statute now under consideration. (ERLE, C.J.—The only doubt I ever remember to have heard, was, whether the certificate (under the old Act) must be obtained before action brought. I recollect once sending up from an assize town for a certificate.) If a certificate obtained at any time before the trial was sufficient, the argument about the necessity of pleading the want of a certificate would be idle

and absurd. To entitle a party to maintain an action upon a contract, it is essential that the contract should be a lawful one at the time it is entered into.

ERLE, C.J.—This is an action brought by Turner and Smith, medical practitioners, against a patient, for attendances and medicine commencing in September 1861. Now, it is clear that the defendant had the consideration; and he seeks to defeat the claim by reason of the 32nd section of the 21 & 22 Vict. c. 90. At the trial it was proved that Turner was duly registered under the Act as a surgeon and apothecary in the year 1859; and it was also proved that Smith was registered as a surgeon, but only on the day before the trial. Both, therefore, had strictly complied with the words of the Act, and both, according to the distinct judgment of the Court of Exchequer in Ireland in the case of *Haffield v. Mackenzie*, to which I entirely accede, were entitled to sue. But, even if Smith had not been registered at all, I should not, as at present advised, have felt disposed to yield to the argument urged on the part of the defendant. The intention of the Act was, as the preamble states, to enable persons requiring medical aid to distinguish between qualified and unqualified practitioners. Here, Turner was from the beginning duly qualified as a registered surgeon and apothecary, and therefore the patients of the firm of which he was the head had all the security the Act intended to give them (*a*). How can it matter to the patient whether the attendance is given and the medicine dispensed by an assistant under the supervision of his master, or by one who calls himself a partner and takes a share of the profits? Here, both partners were thoroughly qualified, and both were registered. This is a mere stamp objection; and, construing the statute according to its strict words, I am of opinion that it ought not to prevail.

WILLES, J.—I am of the same opinion. Two questions are presented here,—first, whether there is anything illegal in a partnership between a qualified and an unqualified medical practitioner,—secondly, whether the statute has been complied with. Is there anything illegal in A., a surgeon, and B., a surgeon and apothecary, engaging with C., a patient, that one shall attend him in his capacity of surgeon and the other in his capacity of apothecary, and that they shall be remunerated for their several services by a joint payment to the two? I find nothing in the statute to render such a transaction illegal, each being a duly-qualified practitioner within the statute. That being so, I entirely coincide with my Lord in the opinion he has expressed, that the requirements of the statute have in this case been duly complied with, and that the rule must be discharged.

BYLES, J.—I am of the same opinion. Looking at the very words of the 32nd section of the statute, it seems to me that all that was necessary for the plaintiffs to do, was, to prove at the trial that they were then registered under the Act. The words are,—“unless he shall prove upon the trial that he is registered under this Act.” All the party has to prove, is, that he is registered before he gets a verdict. Independently of the case of *Haffield v. Mackenzie*, I should have thought, and I did at the trial think, there was very little in the objection; but, after that ease, I cannot entertain the smallest doubt. As to the other objection, that the one partner was registered under the Act as a surgeon and apothecary, and the other as a surgeon only,—it comes to this, that, where two medical men carry on their profession in partnership, one being registered as a surgeon, and the other as an apothecary, no part of a claim for their services can be recovered in a court of law during the life of either. That is so unreasonable a conclusion that I should require very strong words to induce me to arrive at it. This is a disqualifying statute, and therefore is to be construed strictly.

KEATING, J., concurred.

Rule discharged.

GIBBON v. BUDD

1863. *April* 30.

[32 L. J. (Ex.) 182]

Reported also :

2 H. & C. 92 ; 8 L. T. 321 ; 9 Jur. (N.S.) 525 ; 11 W. R. 626.

Action—*The Medical Act* (21 & 22 Vict. c. 90)—*Right of a Physician to recover fees.*

“*The Medical Act*” (21 & 22 Vict. c. 90) gives a physician who is registered under the Act, a legal right to recover fees without a special agreement for remuneration.

Declaration against the defendant, as executor of Henry Budd, for work, care and attendance upon the testator, and on accounts stated.

Plea—Never indebted.

The particulars indorsed on the writ claimed £21, for twenty professional attendances as a physician, at one guinea each.

The case was tried, before BRAMWELL, B., at the Sittings after Michaelmas Term.

The plaintiff was a physician living in Finsbury Square ; he was a member of the College of Physicians, and registered under the Medical Act (21 & 22 Vict. c. 90). The principal question of fact in dispute at the trial was, whether the plaintiff attended as a physician professionally, or merely called on the testator as a casual friend. The jury found for the plaintiff for the amount claimed. A point was also made at the trial, that the plaintiff could not maintain an action for his fees, and *Veitch v. Russell* (a) was cited ; and, pursuant to leave reserved, a rule was obtained, in Hilary Term, to enter a nonsuit, on the ground that, by law, a physician cannot, as such, recover fees for advice without a special contract, and that there was no evidence of such a contract.

Parry, Serj., and *H. T. Cole* showed cause.—It is conceded, that before the Medical Act (21 & 22 Vict. c. 90), the plaintiff could not have sued ; but section 31 of that Act gives a physician a right to maintain an action (b). The express words of the statute cannot be got rid of.

Lush and *Dowdeswell*, in support of the rule.—The effect of the Act is not to enlarge any existing, or to confer any new, right of action where it did not exist before. A physician was not entitled to sue before the Act, because no contract was implied between him and his patient (*Veitch v. Russell* (a)) ; but the parties might still make a special contract entitling the physician to sue, provided he is on the register. Section 32 must be read before section 31, for it prevents any person suing unless on the register. Then section 32 simply presumes the right to sue, if on the register ; but the right must exist apart from the section. The proviso, with respect to the bye-laws of a College of Physicians, would apply to special contracts, or may be regarded as introduced *ex abundanti cautela*. The construction sought to be put on the Act by the other side would overrule *Allison v. Haydon* (c) and *Chorley v. Bolcot* (d) ; whereas the defendant's contention is consistent with the interpretation put on the Act by Vice-Chancellor Wood, in *The Attorney-General v. The College of Physicians* (e), recognised in *Kennedy v. Broun* (f). Clear words would have been used if the Legislature intended to alter the existing law in respect to the implied contracts of medical men. There was, moreover, no mischief requiring any remedy, for it was always competent to the parties to make an express contract,

(a) 3 Q. B. Rep. 928 ; 12 L. J. (Q. B.) 13.

(b) The Royal College of Physicians has passed the following bye-law : “ No fellow of the College shall be entitled to sue for professional aid rendered “ by him.” This bye-law is made pursuant to the 21 & 22 Vict. c. 90, and does not extend to members. [The bye-law is still in force—1912.]

(c) 4 Bing. 619.

(d) 4 Term Rep. 317.

(e) [*Ante* page 28.]

(f) 32 L. J. (C. P.) 137.

differing in this respect from the case of a barrister, as settled by *Kennedy v. Broun*.

POLLOCK, C.B.—I am of opinion that this rule ought to be discharged. It seems to me that the proviso in the clause which we are discussing puts an end to all doubt about the true construction of the clause itself. The section says, that all the persons who are enumerated shall practise with reference to their several qualifications. It then says, they all may sue for a reasonable remuneration for what they have done. But then with respect to a physician, it says, that that shall not prevent any College of Physicians from preventing their members or fellows from demanding a fee. It seems to me to mean this: “whereas “heretofore there was a doubt about the right of physicians to “recover in an action, it shall now be the law that they may “recover; but, nevertheless, the fellows of any college, if they “desire to preserve their dignity and to practise for an *honorarium*, “they may by the bye-law do so.” That seems to me to make the whole clause sensible, and the whole scope of the Act of Parliament consistent. The present action is brought to recover fees as a physician. The jury have disposed of the question whether the plaintiff was practising as a friend gratuitously, or professionally in the expectation of fees. There can be no doubt that the old notion was, that if a physician practised professionally he expected something; but he expected it as an *honorarium* or gratuity, and not as a matter that he had a right to claim; for the presumption was, that the practice was honorary, and so far gratuitous that physicians could make no legal claim. Now, however, the presumption is the other way; and a physician practising without distinctly making an arrangement that he shall not be paid is entitled to be paid, unless he is restrained by some bye-law of the College of Physicians. In my opinion, therefore, the rule ought to be discharged.

MARTIN, B.—I am of the same opinion. I certainly think that this is a question of fact for the jury. I apprehend there is no doubt that, notwithstanding this Act of Parliament, it is quite competent for a medical man to attend a patient and not to be paid for it; and if the jury find that the understanding between the parties was that his attendance was to be gratuitous no payment could be demanded for it. I do not think this Act of Parliament makes any difference whatever in that respect. The case of *Veitch v. Russell (a)* seems to be this: that it was competent for a medical man to make a bargain with a person whom he attended, to receive from him compensation in money; but that, inasmuch as it was the practice of medical men not to receive this compensation as a right, upon a mere attendance

no inference should be drawn that there was any contract to pay. I think that is the true construction to be drawn from that case. Now taking that as the rule, and as the law at the time when this Act of Parliament was passed, what takes place? The 32nd section of the statute (and I read that first, as Mr. *Lush* contended it ought to be read first) contains a positive enactment "that
" no person shall be entitled to recover any charge in a court of law
" for any medical or surgical advice, or for medicine, unless he shall
" prove upon the trial that he is registered under this Act." So that the Legislature has put an absolute prohibition against recovering a charge in a court of law, except upon proof of registration. There was a similar clause in the Apothecaries Act, making it incumbent upon apothecaries to give similar proof of their being admitted as apothecaries before they could recover. And I remember a question arising in this Court, whether or not it was necessary to plead that, or whether the evidence must necessarily be given by the plaintiff in the action. I believe it was held, it was necessary to prove it, notwithstanding the only pleas were *non assumpsit* or never indebted. Then section 31 contains this further prohibition, by providing that the College of Physicians, if they think fit, may pass a bye-law that none of their fellows or members shall be entitled to sue in any court of law, and that such bye-law may be pleaded in bar. But then comes the enabling part of the 31st section, which refers to all persons, except persons so prohibited by the bye-laws. I apprehend that the fair and clear meaning of that is this: hitherto there were parties (physicians) who could not recover; but now they may, provided they are registered. And all that is necessary for them to do is to satisfy the jury that they attended a patient upon the understanding by both that the charges for professional aid and advice should be paid, and if the attendance is given upon that understanding on both sides, in my judgment the plaintiff is entitled to sue and recover reasonable charges for professional aid by the express words of the Act of Parliament. It seems to me that that is in substance what the jury have found; that upon the understanding of both parties, the one was to receive, and the other to make payment for, the services rendered. If so, I am of opinion that the plaintiff is entitled to recover.

BRAMWELL, B.—I am of opinion that the plaintiff is entitled to recover in this case. It may be convenient to state what the contention was at the trial. At the trial, the plaintiff said, and his counsel said on his behalf, "I attended the deceased man as
" a physician. That being so, although before the 21 & 22 Vict.
" c. 90, I could not have recovered any fees, that statute has now
" made my fees an ordinary debt, and I am entitled to recover

“them.” The defendant said, in answer, “You did not attend him as a physieian. You did not attend him at all ; or, if there were any visits, they were as a friend, so that you never were in the situation of a physician expecting any payment from him, either as a matter of right or as an *honorarium*.” “Moreover,” he said, “even if you were in the position of a physician with the expectation of employment, it was an *honorarium* only, and not as a right, and the statute has not altered the condition of things which would have been the law before it passed as to that matter.” The question that I left to the jury was a controverted question of fact, namely, whether, as the plaintiff said, he attended as a physieian, or, as the defendant said, he did not attend at all, or so far as he did attend, that he attended as a friend only, and that alone was disposed of by the jury, and they disposed of it in favour of the plaintiff ; finding, therefore, that he attended upon the ordinary terms of a physieian, and consequently that if the statute gave him no other title than to an *honorarium*, he had no right to sue ; but if by the operation of this Act of Parliament he had more than a right to an *honorarium* and had an enforceable right in a court of law to recover his fees, that he was entitled to recover. That was the question of law reserved for us to determine. In order to determine that question, it may be convenient shortly to state what the position of a physieian was before the passing of the Act of Parliament. I do not think it possible to state it more happily than was done by Lord Denham in the case of *Veitch v. Russell (a)*. In brief, it was this : if he chose he might stipulate and say “Mind, if I attend you, it must be upon the terms that you undertake to pay me my fees, and undertake as a matter of contract which I can enforce.” He was at liberty to do that, and if he did not do that, but attended the patient then the presumption was that he attended him, in one sense, gratuitously, that is to say, without any right to enforce the remuneration from him, but with the expectation of an *honorarium*. Now the contention on the part of the plaintiff is, that this Act of Parliament has, by the section referred to, altered that latter condition of a physieian. On the part of the defendant, it is said that is not so. In the first place, it may be said there was no necessity to make an alteration, because as it was a mere presumption of law before that there was not an enforceable bargain between the parties, the parties themselves could have rebutted that presumption by, in effect, making one, which it was open to them to make in every case, and that therefore this was a needless enactment. Another argument used is, that the enactment is wrong in its terms because if it is what the plaintiff says it is, it should have been, “And whereas as to physieians the presumption is, that they do not

“attend on the terms of having an enforceable right to remuneration, be it enacted that no such presumption shall prevail, in future, but in the absence of any express bargain to the contrary the physician shall be deemed to be entitled to have an enforceable right to remuneration.” These two arguments therefore are used : first, that there is no necessity for any such provision, and, next, that the most apt words are not used for the purpose of expressing it. Then it is further said that you cannot take these words literally, namely, that every person registered may practise and recover reasonable charges, because that would enable a person to enforce reasonable charges whatever agreement he may have made. That is true also. Then the proviso that the College of Physicians may disqualify their fellows may, it is urged, have a meaning in this respect, that whereas before this Act of Parliament a physician might make a bargain, now, if this bye-law is made, he cannot do that, he cannot make an enforceable bargain. These arguments seem to me to be cogent and worthy of a great deal of attention, and have undoubtedly created a doubt in my mind. But now we must look at the arguments on the other side, on the part of the plaintiff. In the first place, we ought to bear in mind, that the common expression which people used was, “a physician cannot recover his fees.” That was a common expression. It was an erroneous one ; it ought to have been that a physician cannot recover his fees if there is nothing but a common expectation of an *honorarium* on his part. But still it was a common expression, and I think very likely was in the mind of the person who drew this Act of Parliament, and who, I say with great respect, was not very conversant with legal expressions, or he would not have used the expression “that he may recover reasonable charges.” Bearing in mind, therefore, that it was the common notion that a physician could not recover his fees, you may read the section thus : “Every physician, surgeon and apothecary registered under the Act shall be entitled according to his qualification or qualifications to practise medicine and surgery and to demand and recover in any court of law.” That undoubtedly is so, because in “every person” you include “physicians, surgeons and apothecaries,” and if those words had been there, there could not have been much doubt about the meaning of the subsequent words. They are to my mind the same as if they had said, as to a physician, the existing presumption shall not apply. But then there is this extreme difficulty in the defendant’s case, that those words are unmeaning as to a physician unless they have the meaning which is attributed to them to-day—and indeed they are unmeaning unless we suppose them to apply to a physician, because it was not necessary to say that a person

who was registered may recover his fees, because he undoubtedly may. Then, when, in addition to that, we look at the provision that the College may by bye-laws forbid any of their members to sue, it is in its very terms a proviso upon something. It is not a substantive provision that any College of Physicians may prevent their members from suing, but it is some qualification or proviso upon that which goes immediately before. What is that but a proviso upon the previous enactment that physicians may sue? Therefore, taking into account that that proviso manifestly shows that the section does apply to physicians, it seems to me that the result is this: that though the Act says in words persons may sue, it says, in effect, the old presumption of the relation between physician and patient shall not apply; but that the physician works like anybody else, namely, with a right to be paid a reasonable remuneration. On that ground, therefore, I think that the plaintiff is entitled to recover.

Rule discharged.

EX PARTE LA MERT

1863. Nov. 24

[33 L. J. (Q. B.) 69]

Reported also :

4 B. & S. 582 ; 9 L. T. 410 ; 12 W. R., 201.

See also Minutes of General Medical Council :

Vol. II. (1863) 158, 353, 354.

Mandamus, When it lies—Medical Register, Removal from—Power of General Council of Medical Education—21 & 22 Viet. c. 90, s. 29.

Under the 21 & 22 Viet. c. 90, s. 29 the General Council of Medical Education and Registration are sole judges of whether a registered medical practitioner has been guilty of infamous conduct in a professional respect ; and the Council having after due inquiry so adjudged, and ordered the name of the medical practitioner to be removed from the register accordingly, this Court cannot interfere.

Montagu Chambers moved, on behalf of a Mr. La Mert, for a rule calling on the General Council of Medical Education and Registration of the United Kingdom to show cause why a mandamus should not issue commanding them to restore the name of the applicant to the Medical Register. Mr. La Mert's name had been properly inserted in the register under the 21

& 22 Vict. c. 90; and the Council had directed the Registrar to remove Mr. La Mert's name from the register, under the 29th section, on the ground that he had after due inquiry been judged by the Council to have been guilty of infamous conduct in a professional respect. Before adjudging him guilty, the Council had caused the charges against him, which were connected with the publication of a treatise on venereal diseases, to be communicated to him, and received his explanation; and they gave him an opportunity to be heard in his defence, but refused to allow him to be heard by counsel. In support of the application the learned counsel contended, on the affidavits which he read, that the conduct of the applicant as disclosed did not justify his being found guilty of infamous conduct in a professional respect.

COCKBURN, C.J.—We are all agreed that section 29 of the Medical Act of 1858 makes the Medical Council sole judges of whether a medical practitioner has been guilty of infamous conduct in a professional respect, and this Court has no more power to review their decision than they would have, in the present mode of proceeding, of determining whether the facts had justified a conviction for felony or misdemeanour under the first branch of the section. The Council have found the applicant guilty after due inquiry, and whether the facts justified the finding or not, the Council is the tribunal, to whom the Legislature has left the decision as being the best judges in the matter; and this Court cannot interfere.

WIGHTMAN, J., BLACKBURN, J., and MELLOR, J., concurred.

Rule refused.

DE LA ROSA v. PRIETO

1864. May 22.

[16 C. B. (N.S.) 578]

Reported also :

33 L. J. (C. P.) 262; 10 L. T. 757; 10 Jur. (N.S.) 851;
12 W. R. 1029.

1. *The Medical Act (21 & 22 Vict. c. 90) s. 32, which prohibits an unregistered practitioner from recovering for advice, attendance, or medicines supplied, is not confined to cases in which the patient is sued.*

2. *Though an unregistered assistant may sue a registered practitioner for salary, an unregistered practitioner cannot sue a regis-*

tered practitioner for medicines supplied to or attendance upon the patients of the latter at his request.

3. Where medicine or attendance is supplied by an unregistered practitioner to a patient, under a guarantee for payment given by a third person, the statute will afford a defence either to the principal debtor or to the surety; for, the patient does not the less require protection because the paymaster is a third person.

4. A medical officer of a Peruvian vessel of war lying in the Thames engaged the plaintiff, an unregistered practitioner, to attend the crew and troops (partly on board the vessel and partly on shore) during his temporary absence. In an action against the Peruvian officer for the services thus rendered:—Held, that the 32nd section of the Medical Act precluded the plaintiff from recovering,—for, by whatever law the contract was to be interpreted, the remedy must be governed by the *lex fori*.

This was an action for money payable by the defendant to the plaintiff for work and labour done and performed by the plaintiff for the defendant, at his request, and for money found to be due from the defendant to the plaintiff on an account stated between them.

Pleas, never indebted, and payment.

The cause was tried before BYLES, J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows:—In October, 1862, a Peruvian frigate called the *Arica*, of which the defendant was the chief medical officer, was lying in the Thames, off Blackwall. The defendant, being desirous of taking a trip to Paris, procured the plaintiff, who is a Spanish physician residing and practising at the east end of London, to attend his patients (Peruvian subjects) during his (the defendant's) absence, viz., from the 17th of October 1862, until the 17th of February 1863, for an agreed sum (according to the plaintiff's evidence) of £50 per month. The defendant's evidence conflicted with this statement. The plaintiff accordingly attended the crew and troops (about 200 in all), some on board the *Arica*, some on board a transport anchored near her, and others at different houses on shore, during the whole four months. And this action was brought to recover the amount of the stipulated remuneration, less £15 which had been paid on account.

It being conceded that the plaintiff was not registered as a medical practitioner under the Medical Act (21 & 22 Vict. c. 90) (a) it was objected on the part of the defendant that he was not entitled to recover for his attendance and advice.

(a) He was a Spaniard and had obtained a diploma at Montpellier, but had been practising as a physician and surgeon for several years in this country.

For the defendant it was submitted that the prohibition in the statute was confined to the case of an unregistered practitioner suing a patient for attendance or medicines, and did not extend to the case of a contract made by one medical man with another to attend his patients for him,—still less where the attendance was by a foreign doctor upon the subjects of a foreign government on board a foreign ship of war.

The learned judge declined to reserve the point, unless the defendant's counsel would consent to be content with the judgment of the Court upon it. And he left it to the jury, upon the conflict of evidence, to say what amount of remuneration the plaintiff was entitled to.

The jury returned a verdict for the plaintiff for £85 in addition to the £15 paid on account.

Griffiths, in Hilary Term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the ground that there was no evidence on the trial that the plaintiff was registered under the Medical Act, and that the plaintiff was not entitled to recover without such proof.

Montagu Chambers, *Q.C.*, and *Beasley*, in Easter Term, showed cause.—No registration under the Medical Act was necessary to entitle the plaintiff to sue upon this contract. This is not an action by a surgeon or apothecary against a patient for attendance and medicine; it is an action by one medical practitioner against another medical practitioner, to recover a stipulated sum contracted to be paid by the latter for attendance upon his patients during his temporary absence. It is clearly not a case within the mischief of the statute. It has even been held that a firm consisting of two persons, one of whom is registered as a surgeon only and the other as an apothecary, may join in suing for attendance and medicine furnished by both or either in both capacities (*Turner v. Reynall* [*ante*, page 70]); and *ERLE*, *C.J.*, intimated an opinion that the action might be maintained even if one member of the firm was not registered at all. There is no more difficulty in holding this action to be maintainable than in holding that a duly registered medical practitioner may recover for attendances by his assistant. (*ERLE*, *C.J.*—That argument would be very cogent if this were an action by Prieto to recover from his patients for the attendance of Dr. De la Rosa upon them in his place.) This is virtually an appointment of a substitute at a salary. Besides, this was not a contract made in this country; it was made on board a Peruvian vessel of war, and therefore the same as if made in Peru, and subject as to its interpretation to the laws of that country. Neither of the contracting parties was a British subject. (*BYLES*, *J.*—The plaintiff was not a Peruvian: and the

contract was to be performed here (b.) The Medical Act does not apply to a man having a foreign diploma: he could not be registered. This man's employment may fairly come within the 6th section of the Medical Act, 1859. He was a Spaniard who had duly obtained a diploma abroad. Suppose a Frenchman found in this country a man whom he had attended in France, might he not sue him here for the debt thus contracted?

Griffiths, in support of his rule.—This case falls clearly within the mischief the Medical Act was aimed at. It never was intended that a registered practitioner should be able to get an unqualified person to attend his patients during his absence. The statute was passed for the security of the patient,—that he should know that he is in the hands of a person of competent skill and knowledge. (BYLES, J.—A great many attendances, in the case of a medical man in large practice, must be given by assistants (c).) In that case the assistant is acting under the immediate superintendence and control of his principal. The mode of payment is nothing: the question is, whether the services sued for are medical services. The plaintiff did not enter the service of the defendant in the capacity of an assistant: but he contracted as his substitute to give his services as a medical practitioner to the crew and troops belonging to the *Arica*, some being on board that vessel, some on board another ship, and some on shore. The 6th section of the 22 Vict. c. 21 goes far to show that such attendance as this is within the former Act. This is not like the case of a foreign surgeon acting on board a foreign ship. The *lex fori* must govern the procedure.

Cur. adv. vult.

BYLES, J., now delivered the judgment of the Court (d):

We are of opinion that the plaintiff, being an unregistered medical practitioner, cannot recover for medical attendance afforded to the patients of the defendant on the defendant's credit.

It was contended at the trial that the Act of Parliament 21 & 22 Vict. c. 90, ss. 31 and 32, did not apply to contracts between medical men themselves, but was confined to cases in which the patients are sued for medicines or medical attendance.

We agree that the Act has no application in the case of an unregistered assistant suing a registered practitioner for his salary. But, where the action is brought either against the patients themselves, or against any one who is to pay for medical

(b) See *Grell v. Levy*, 16 C. B. (N.S.) 73.

(c) [See Introduction, *ante*, pages xxvi, xxvii.]

(d) The judges present at the argument were, Erle, C.J., Willes, J., and Byles, J.

attendance or medicine prescribed and supplied to them, we think the statute applies.

Suppose medicines administered by an unregistered practitioner to a patient, under a guarantie for payment given by a third person, the statute would, we conceive, be a defence either to the principal debtor or to the surety. Suppose medicines administered to the poor of a parish or union, on the credit of overseers of the parish or guardians of the union, the statute would in like manner be a defence ; for, the case would fall both within the words and the spirit of the enactment. The patient does not the less require protection, because the paymaster is a third person.

In the case now under consideration, the defendant, when he went abroad, and engaged the plaintiff to act in his place, agreeing to pay for medical attendance afforded by the plaintiff during his absence, was in the situation of an ordinary paymaster ; and not the less so because he happened to be a medical man, for the patients during his absence had no benefit from his skill or attendance.

It was further contended, that the ship on board of which the contract was made, being a Peruvian ship of war lying in the Thames, the contract was not governed by the municipal law of this country, but by the law of Peru. For many purposes, a foreign vessel of war, not only on the high seas, but even in the waters or ports of a friendly state, is undoubtedly considered as a foreign territory ; and in some cases, the local jurisdiction may be excluded ; see Wheaton's *Elements of International Law*, p. 189, and 1 Kent's *Commentaries*, p. 164, n. It is easy to perceive that questions of great complexity and difficulty may arise ; and, if this contract had been made not only on board the vessel, but between parties who were on both sides part of the crew, and if it had been a contract to be entirely performed on board the vessel, and if the question had arisen otherwise than in the form of an action in an English court requiring certain proof to be given at the trial, there might have been much weight in the suggestion.

But, first the contract was not made between Peruvians only, but was made between a plaintiff domiciled in England and a Peruvian,—the plaintiff being by the laws of this country subject to a personal disqualification. Secondly, it was not to be performed entirely on board the vessel, but partly on shore ; and generally speaking, a contract is to be governed by the law of the country where it is to be performed. So that it is impossible that the Peruvian law should entirely govern this contract. Thirdly, the disqualification of the plaintiff to sue in England for

medical attendance afforded by him within the ambit of English territory, arises from the necessity of proving his registration at the trial. It is part of the *lex fori* of the country where the remedy is sought; and even in cases where the law of another country is to interpret the contract, yet the *lex fori* is to govern the remedy; see *Huber v. Steiner*, 2 Bing. N. C. 202, 2 Scott, 304; *Don v. Lippmann*, 5 Clark. & Fin. 1; Story's Conflict of Laws, 2nd edit., 840.

The rule must therefore be made absolute to enter a nonsuit.

Rule absolute.

ANDREWS v. STYRAP

1872. May 7.

[26 L. T. 704]

See also Minutes of the General Medical Council :

Vol. X. (1872) 69, E. BR. 2.

The Medical Act (21 & 22 Vict. c. 90) s. 40—Title of "M.D."—“Wilfully and falsely” taking and using the same—Conviction for by justices under the above section—Evidence of the offence—Diploma of foreign university obtained by purchase only.

A., a druggist, had attended a patient in the capacity of a medical man, and sent in to him a bill for such attendances, headed, “Mr. P. to Thomas Andrews, M.D.” setting out a variety of charges for attendance and medicine, &c. He subsequently wrote a letter signed, “Thomas Andrews, M.D.” threatening legal proceedings unless the bill were paid, and he gave a receipt for the bill when paid, signing it in the same way. There was a coloured lamp over his shop door, on three sides of which the words and letters “Thomas Andrews, M.D.” were painted. It appeared that he had obtained by the payment of a sum of money a diploma of doctor of medicine from the University of Philadelphia in the United States, but that he had never been in America, or studied, or passed any examination, for such degree, and he was not registered under the Medical Act.

On Appeal, from a conviction by justices under section 40 of the Medical Act (21 & 22 Vict. c. 90) for having unlawfully wilfully and falsely taken and used the name, title, description and addition of “M.D.” and “thereby implying that he was then registered under the Medical Act, whereas he was not so registered,” &c., it was—

Held by the Court of Exchequer (MARTIN, BRAMWELL and PIGOTT, BB.) that the conviction was right, and must be affirmed.

This was an appeal from a decision of justices, convicting the defendant, upon an information laid before them under section 40

of the Medical Act (21 & 22 Vict. c. 90), for falsely, &c., taking and using the name and title of a physician and doctor of medicine, and it came before the Court on a case stated by the justices under 20 & 21 Vict. c. 43. It appeared from the case that at a petty sessions in and for the borough of Shrewsbury, on the 21st of December 1871, an information was laid by the respondent against the appellant, a druggist in the said borough, charging him with having on the 25th of September 1871, within the said borough, *unlawfully wilfully, and falsely* taken and used a name, title, addition, and description, to wit, "M.D.," meaning thereby "doctor of medicine," and thereby implying that he, the said appellant, was then registered under the Medical Act, whereas he was not so registered, he, the said appellant, not being a person who was actually practising in medicine in England before the 1st of August 1815, contrary, &c.; and upon hearing the said parties, appellant and respondent respectively, by attorney and counsel, the matter was determined by the said justices, and the appellant was duly convicted before them of the said offence, and adjudged to pay the penalty of £20, including costs, to be levied in default of payment by distress and sale of his goods; and in default of sufficient distress he was to be imprisoned for two calendar months, unless the said penalty and costs were sooner paid.

The appellant being dissatisfied with the determination of the justices as erroneous in point of law, applied to them to state and sign the present case for the opinion of this Court, from which it appeared that on the hearing it was proved and found as a fact that the appellant had attended a patient, the sister of one Thomas Parton, in the capacity of a medical man, and had, on the day named in the information, sent in to the said Thomas Parton a bill in the following terms:—

Mr. Parton,	Shrewsbury, 25th Sept., 1871.
To Thomas Andrews, M.D.	
To professional attendance, medicines, &c., late	
Miss Parton	£17 8s. 6d.

That on the 7th of November following the appellant received £5 on account of the said bill, and on the same day sent in to the said Thomas Parton another bill headed in the same way:—

Mr. Parton,	
To Thomas Andrews, M.D.	
To professional attendance, medicines, &c., as per	
items over.	£17 8s. 6d.

And then followed the several items of charge for medicines, attendance, journeys, &c., on the various days specified from

26th of April to 26th of August 1871. This bill was accompanied by the following letter from the appellant to Mr. Parton :—

Sir,—Unless you settle balance of this account before Thursday week, I shall place it in the hands of my solicitor without further notice.

Yours, &c.,

T. ANDREWS, M.D.

The balance of the said account was paid on the following day by the said Thomas Parton, who received the following bill and receipt on the 9th of November :—

Mr. Parton,	Shrewsbury, 9th Nov., 1871.
To Thomas Andrews, M.D.	
To professional attendance, medicines, &c., &c.,	
Miss Parton.	
Balance of account	£12 8s. 6d.
9th Nov., 1871.	

Settled. EDWYN ANDREWS.

It was further proved that the appellant had a lamp over the door of his shop at Shrewsbury, on three sides of which the words "Thos. Andrews, M.D.," were painted.

A book purporting to be the Medical Register for 1871, marked on the outside "By Authority," was produced by the registrar of the County Court, and which he said had been issued to the Court by authority for their guidance, and upon searching it the name of the appellant was not found there.

On the part of the appellant the above facts were not denied, except as to the words "unlawfully, wilfully, and falsely," and, in support of the contention that the appellant did not "unlawfully, wilfully, and falsely" take and use the title of M.D., &c. (as charged in the information), a diploma of the American University of Philadelphia in the United States, dated 20th of February 1871, was put in. It was in Latin, and the following translation was handed in to the justices by the appellant.

TO ALL TO WHOM THIS PRESENT LETTER MAY REACH,
The President Fellows and Professors of the American University of Philadelphia, founded by the Laws of the Republic of Pennsylvania, give salutation.

Inasmuch as in all Universities, properly and legitimately constructed, either here or elsewhere in the world, it was a praiseworthy and ancient usage that men who have not less diligently and faithfully paid attention to literature, or to ingenuous arts, or to any liberal studies whatever, meanwhile conducting themselves uprightly and honourably, should be adorned

with some distinguished honour, and raised to merited dignity ; and since by the laws of our Republic we possess the fullest power of distinguishing and decorating with academical titles, and of advancing to degrees in sacred theology, in arts and medicine, gentlemen well deserving of them, we therefore, furnished with this authority, and not unmindful of the ancient usage, have adjudged, and at a meeting of the Council have decreed, the eminent gentleman devoted to the highest pursuits, Thomas Andrews, about whose proficiency in medical science and honourable character we have sufficiently inquired and scrutinised, to be worthy and fitting to be honoured as a learned man in the highest degree of dignity : wherefore with one accord we have both elected and made him Doctor of Medicine, and have given and assigned to him all rights and privileges which belong to that degree. Now, all and singular these proceedings we in good faith notify unto you by the present letter, fortified with our seal and the signature of the President of the University, this 20th day of the month of February, and in the year of our Lord 1871.

A seal, purporting to be the seal of the said university, was appended to this document, as were also several signatures purporting to be the signatures of professors or officers thereof. A witness also proved that he held a similar diploma from the said university, and that he had been in America, and he testified to the authenticity and genuineness of the seal and the signatures appended to the appellant's diploma. He also said, on cross-examination, that a diploma could be obtained by an examination before examiners in England commissioned by the University of Philadelphia for that purpose. It was not alleged that the appellant had ever been in America, nor was any proof given that he had undergone any examination in order to obtain the diploma.

Upon these facts the justices came to the conclusion that the appellant had committed the offence charged in the information, and they duly convicted him thereof as aforesaid, and the question for this Court is whether, upon the above facts, the justices were justified in coming to that conclusion, and so convicting the said appellant, or whether the fact of the appellant having obtained the above-mentioned diploma exonerated him from the charge made against him.

(Sections 31, 36, and 40 of the Medical Act of 1858 were referred to.)

Huddleston, Q.C. (with him was *Bullen*), for the respondent, supported the conviction, and following the course adopted in *Ellis v. Kelly* [*ante*, page 21] and *Jones v. Taylor* (28 L. J. (M. C.) 204 n.) was called on by the Court to begin—He contended that

the conviction was right, and that the justices, having found all the facts and come to a decision upon them, the Court would not interfere with the conclusion at which they had arrived.

Ladd v. Gould [*ante*, page 8].

R. Vaughan Williams, for the appellant, contra, urged that the diploma of the University of Philadelphia, which was an institution of high standing, and fully empowered to grant degrees, was a sufficient warrant for the appellant's title of "M.D.," and saved him from coming within the operation of section 40 of the Medical Act. (PIGOTT, B.—The American University may be all that you say it is, but unfortunately this student has never been there.) It appears that the University is constantly in the habit of appointing examiners in other countries, and *non constat* that that was not done here. The fact of the Act of Parliament granting certain privileges to some persons and imposing certain restrictions on others, by no means makes it unlawful to practise or to assume the title of "M.D." The Act only imposes certain liabilities or restrictions, as for instance, by section 36, no unregistered person can hold certain medical offices there specified. If it be contended that the mere fact of practising as a "doctor," without being registered, is an offence, the answer is in that section. The offence must be something more; a man must practise as a doctor with the object of obtaining the privilege conferred by the Act on registered individuals, or of avoiding or getting rid of the disabilities imposed upon non-registered persons. The mere fact of using the letters "M.D." after his name is no evidence of the offence, or of doing anything coming within the two last-mentioned heads. The case of *Ellis v. Kelly* is an authority that the merely appending "M.D." to one's name is no offence under the Act. In the present case it was done under a supposed right by virtue of the foreign diploma, and *Ellis v. Kelly*, as well as *Pedgrift v. Chevallier* [*ante*, page 18], show that that is no offence. The evidence in the present case is very similar to that in *Ellis v. Kelly*, and the remarks of the Court there, and particularly those of BRAMWELL, B., that it is the doing the thing "wilfully and falsely" that constitutes the offence under the Act, which doing it under a supposed, even if it be a mistaken right, cannot be held to be, are very applicable here. The appellant here, had a foreign diploma. (MARTIN, B.—It is no diploma at all; it is a mere pretence. BRAMWELL, B.—The matter does not appear to me now as it appears to have appeared to me then.) It is submitted that there is no evidence here of the appellant having done anything more than incorrectly or mistakenly used the title of "M.D." In this case it is an American degree; in *Ellis v. Kelly* it was a German one. *Pedgrift v. Chevallier* shows that the mere fact of a man's name

not being in the Medical Register is not sufficient to warrant a conviction, for which purpose there must be evidence of wilful falsity, of which there is here an entire absence. To hold the appellant guilty of the offence would seriously affect hundreds of Scotch practitioners who are not registered under the Act.

MARTIN, B.—I believe we are all of opinion that the justices were perfectly right and thoroughly well warranted in the conclusion at which they arrived upon the facts before them in this case, and that, therefore, this conviction must be affirmed. It is plain to my mind that this is a question of fact. There was ample evidence that this appellant *wilfully* (for he did it on purpose) and *falsely* (because he pretended thereby to be on an equal footing with any regularly bred and registered physician or M.D. in England) took, assumed and used the title of “M.D.” under a diploma obtained by him from an American University, without any course of previous study or any examination, but simply on the payment of a sum of money, and which diploma, therefore, he must have known to be in fact utterly worthless and valueless as an indication of the possessor’s merit, learning, and skill as a physician, or as giving him any of the privileges of a registered medical man. I am glad to hear from a learned gentleman now in Court that the American Legislature have recently prohibited the granting of these degrees to persons on the payment of a sum of money only, and without a previous course of study and preliminary examination. The conviction must be affirmed.

BRAMWELL, B.—I entirely agree with all that has been said by my brother MARTIN.

PIGOTT, B.—I also concur in thinking that this conviction must be affirmed.

Judgment for the respondent, affirming the conviction, with costs.

LEMAN v. FLETCHER

1873. May 2.

[42 L. J. (Q. B.) 214]

Reported also :

L. R. 8 Q. B. 319 ; 28 L. T. 499 ; 21 W. R. 738.

Medical Act, 1858 (21 & 22 Vict. c. 90), ss. 31 & 32—*Apothecaries Act* (55 Geo. 3, c. 194), s. 21—*Right of Surgeon to sue for Medicines unconnected with Surgical Treatment.*

Under the Apothecaries Act (55 Geo. 3, c. 194), s. 21, which is not repealed by the Medical Act, 1858 (21 & 22 Vict. c. 90), ss. 31, 32, a member of the College of Surgeons registered as a surgeon only under the later Act, and having no further qualification, cannot recover for medicines administered by him in a case not requiring surgical treatment.

Action in the Alfreton County Court to recover the sum of £2 19s. 6d. for medicine supplied to and medical attendances made upon the defendant's wife and children by Arthur Matthews.

Arthur Matthews is a surgeon practising at Selston, Nottingham and is registered under the Medical Act, 1858 (21 & 22 Vict. c. 90), as a member of the Royal College of Surgeons of England. He has no other qualifications within the meaning of the Act.

At the trial before George Russell, Esq., on the 22nd of October last, it appeared from the evidence that some of the items in the bill against the defendant were for medicines administered in the case of an internal disease not requiring surgical treatment, and for advice and attendances connected therewith, and that other items were for medicines administered for the purpose of removing a complaint which it is within the province of a surgeon to attend to and cure.

It has been agreed that the sum of £2 14s. shall be taken to represent the value of the first named items, and the sum of 5s. 6d. the value of the last mentioned items.

For the defendant it was objected that in order to entitle the plaintiff to recover the charges of any of the above mentioned items, Matthews ought to appear in the Medical Register as a licentiate of the Society of Apothecaries, inasmuch as the Apothecaries Act (55 Geo. 3, c. 194), was not repealed by the Medical Act, 1858, and under section 31 of the latter Act, a person could not recover charges for medicines and professional advice and attendance except according to his qualification.

For the plaintiff it was contended, that the Apothecaries Act was impliedly repealed by the Medical Act, that the words "according to his qualification," in the 31st section of the latter Act, applied only to the right to practise and were inserted merely to preserve the grades of the medical profession, and did not apply to the latter part of the section giving the right to sue. That section 31 was not to be regarded in the question before the Court, but that section 32 was the only section to be looked at, that it was a disqualifying section and should be construed strictly, and under it, to entitle a person to recover for any kind of professional aid, it was only necessary that he should be simply

registered under the Medical Act, 1858, and that section 34 supported this contention.

The learned Judge reserved his judgment, and on the 26th of November last, delivered judgment for the defendant, holding that sections 31 and 32 must be read together, that by virtue of those sections the plaintiff could recover for medicines and advice and attendance according to the qualifications of Matthews only, and as he possessed no other qualifications than that of a surgeon, the plaintiff was not entitled to recover the items so objected to by the defendant.

The plaintiff having entered in the County Court about one hundred other cases of a similar nature, the learned Judge gave leave to appeal.

The questions for the opinion of the Court are :—

First. Whether a person entered in the Medical Register under the Medical Act, 1858, and possessing no other qualification than that of a member of the Royal College of Surgeons of England, can recover charges for medical advice and attendance or medicines administered in the cure of diseases or complaints not requiring surgical treatment.

Second. Whether such a person can recover for medicines administered for the purpose of removing complaints which it is within the province of a surgeon to attend to and cure ?

Cave, for the plaintiff.—The plaintiff having proved that he was registered under 21 & 22 Vict. c. 90 was not disabled by the 32nd section of that Act from recovering for any medicine which he had both prescribed and supplied, whether such medicine was prescribed in a case requiring surgical treatment or not. The 31st section of the Act is an enabling and not a disabling enactment and cannot be read with the 32nd section for the purpose of extending the disability created by the latter section. The object of the Act was to encourage registration and, as between the medical practitioner and the patient, to abolish the distinction between medical and surgical cases. These sections must be taken to have impliedly repealed the Apothecaries Act. 35 Geo. 3, c. 194, s. 21, which prevents anyone who is not entitled to a certificate from the Court of Examiners, from recovering the price of medicines supplied by him.

(BLACKBURN, J.—Assuming that the plaintiff could not maintain an action before the late Act, how can he now, except according to his qualification ?)

The Legislature in passing the last Act intended that any practitioner duly registered should be enabled to recover for medicines supplied by him. He cited *Gibbon v. Budd* [*ante*, page 75], *Haffield v. Mackenzie*, [*ante*, page 10], *Turner v. Reynall* [*ante*, page 70].

R. V. Williams, for the defendant, was heard only as to the plaintiff's right to recover for medicines supplied as a surgeon.

BLACKBURN, J.—I think that there can be no doubt in this case. By the Apothecaries Act (55 Geo. 3, c. 194), s. 21, no apothecary could recover for medicines supplied by him, unless he had a certificate from the Society of Apothecaries. Then came the Medical Act (21 & 22 Viet. c. 90), which by section 31 enables a person registered under the Act according to his qualification to practise medicine or surgery and recover charges for professional aid and the cost of medicines supplied by him. This section does not repeal the Apothecaries Act, but so far as its provisions apply, takes a case out of that Act. Therefore, where the qualification of a medical practitioner is to practise medicine, he is at liberty to recover for medicines not connected with surgery; but if he is not so qualified, he is not within the new Act, and the former disability remains. Section 32 does not advance the plaintiff's case, as it is a disabling section and confers no additional rights. It seems to me quite proper, that a gentleman should not be qualified to practise in one department of medicine, merely because he has passed an examination in another.

QUAIN, J., concurred.

ARCHIBALD, J.—I am of the same opinion. The Medical Act was passed in order that all medical practitioners might be registered according to their qualifications. By the Apothecaries Act, no one can recover for medicines sold by him, unless he has a certificate, and the only effect of section 31 of the later Act is to enable a physician to recover according to his qualification. The plaintiff however was only qualified as a surgeon and not as an apothecary, and as there is nothing to show that the Apothecaries Act is repealed, his disability remains.

*Judgment for the defendant upon the first point
and for the plaintiff on the second.*

LEMAN v. HOUSELEY

1874. Nov. 20.

[44 L. J. (Q. B.) 22]

Reported also :

L. R. 10 Q. B. 66 ; 31 L. T. 833 ; 23 W. R. 235.

Medical Act, 1858 (21 & 22 Viet. c. 90), ss. 31, 32—*Apothecaries Act* (55 Geo. 3, c. 194), ss. 14, 21—*Medical Practitioner*

registered at the date of trial, but neither qualified nor registered when services rendered—Right to recover.

A licentiate of the Society of Apothecaries cannot recover his charges for advice and medicine in a case not requiring surgical treatment, where it appears that at the date of his services he did not possess his qualification and was not registered under the Medical Act, 1858 (21 & 22 Vict. c. 90), s. 15, though he is so registered on the day of the trial of the action.

*The plaintiff was a member of the College of Surgeons, and registered as such under 21 & 22 Vict. c. 90, but had no further qualification. He brought an action for medicines, advice and attendances in a case not requiring surgical treatment; and it was held by this Court (see *Leman v. Fletcher* [ante, page 92]) that he could not recover, as the Apothecaries Act, s. 21, was not repealed by the later Act, which only enabled a physician to recover according to his qualification. Subsequently to this decision the plaintiff was examined for and obtained his diploma as an apothecary, and was placed on the Medical Register as a medical and surgical practitioner. He then took proceedings to recover the amount due to him for medicines, &c., in a case precisely similar to that of *Leman v. Fletcher*:—Held, that in section 32 of 21 & 22 Vict. c. 90, it was clearly intended that a practitioner should have been examined and have become qualified at the time of the services in respect of which he was allowed to recover; and though, if he were qualified at the time of his services, he might possibly procure himself to be registered before the trial, he could not cure his want of qualification.*

Turner v. Reynall [ante, page 70] considered.

This was a case stated on appeal from the decision of a County Court Judge.

The action was brought to recover £8 3s. 6d. for medicine supplied to and medical attendances made upon the defendant by Arthur Matthews.

Arthur Matthews is a surgeon, practising at Selston, Nottingham, and on the 22nd of October 1872, was registered under the Medical Act (21 & 22 Vict. c. 90), as a member of the Royal College of Surgeons of England, and had no other qualification within the meaning of the Act.

Prior to the 22nd of October 1872, the plaintiff had issued and served about one hundred plaints or summonses against different parties (among others against the present appellant) for sums alleged to be due from them to Arthur Matthews for surgical and medical attendances and medicines, respectively, and the plaints or summonses were returnable and were on the Judge's list for hearing on the 22nd of October 1872.

The first case called on was the case of the plaintiff against Hiram Fletcher. In that case it appeared from the evidence that some of the items in the bill against the defendant Fletcher were for medicines administered in the cure of an internal disease not requiring surgical treatment, and for advice and attendance connected therewith, and that other items were for medicines administered for the purpose of removing a complaint which it is within the province of a surgeon to attend to and cure.

Objection was taken in that case that for want of due qualification on the part of Matthews, the plaintiff was not entitled to recover, and upon the objection the Judge granted a case, which was argued and decided in the Court of Queen's Bench on 2nd of May 1873, when the Court held that as Matthews was registered as a surgeon only, the plaintiff was entitled to recover in respect of Matthews's surgical cases and the medicines applicable thereto only, but not in respect of the medical cases and the medicines applicable thereto.

On the 22nd of October 1872, the whole of the actions (and amongst them that against the present appellant) were on the Judge's list, but were not called on, but upon the decision of the Judge in the case of *Leman v. Fletcher* [ante, page 92], and his granting a case for appeal, the other cases stood generally adjourned.

Subsequently to the 22nd of October, and to the judgment of the Court of Queen's Bench in *Leman v. Fletcher*, Matthews was examined for, and on the 25th of October 1873, obtained his diploma as an apothecary, and has been placed and was, on the 20th of January 1874, on the medical register as a medical and surgical practitioner.

After the registration an application was made to the Judge of the County Court to appoint a day for the hearing of the adjourned cases, and the Judge accordingly fixed the 20th of January 1874. On that day upon the first case being called on, namely, the case against the now appellant, it was admitted that part of the items in the plaintiff's particulars were for medicines administered in the cure of an internal disease not requiring surgical treatment, and for advice and attendance connected therewith, and that other items were of a surgical nature.

It was contended that a judgment in accordance with the decision in *Leman v. Fletcher* ought to be entered in the appellant's case and in all the cases, on the grounds, first, that it was necessary that Matthews should hold the necessary qualifications, and be registered in respect thereof at the time the services in question were rendered; and secondly, and principally, on the ground that the 22nd of October 1872, the day when the summonses

were returnable and were on the Judge's list for hearing, although not actually heard, was the day of trial or hearing within the meaning of section 32 of the Medical Act, 1868.

The learned Judge decided against this contention, and held as against the appellant that, inasmuch as then, on the 20th of January 1874, Matthews was on the register as both a medical and surgical practitioner, the plaintiff was entitled to recover generally in respect of the whole of his claim both for medical and surgical attendances and medicines respectively, and he gave judgment accordingly, but gave the defendant leave to appeal.

The question for the opinion of the Court of Queen's Bench is, whether, under the circumstances, and upon the grounds, above set forth, the appellant is entitled to have a judgment entered similar to that in the case of *Leman v. Fletcher*.

Patchett, for the appellant.—The decision of the County Court Judge was wrong. It was not enough that upon the day of the trial Matthews' name was on the register. The Legislature, in the Medical Act, 1858, intended to make it a condition precedent to the right of medical men to recover their charges, that they should be qualified at the time of their services. A practitioner duly qualified by examination at the time of his attendances may possibly be allowed to procure his name to be registered before his action is tried; but to allow all persons after attending a patient to pass this examination, and then get themselves registered and bring an action for their fees, would lead to this result—that any medical student might practise between the commencement of his studies and his examination.

Cave, for the respondent.—The Court will not extend the words of the Act, so as to bar the plaintiff's right to recover his reasonable charges. Section 32 of the Medical Act only takes away the right when the plaintiff fails to prove upon the trial that he is registered. In *Turner v. Reynall* [*ante*, page 70], where one of the plaintiffs did not become a member of the College of Surgeons till after the writ was issued, the Court held, in accordance with *Haffield v. Mackenzie* [*ante*, page 10], that the plaintiffs proved that they had sufficiently complied with the terms of section 32.

(QUAIN, J.—In that case the unregistered plaintiff may have been qualified at the time of the services. BLACKBURN, J.—Section 14 of the Apothecaries Act (55 Geo. 3. c. 194) enacts that it shall not be lawful for any person after August 1815, to practise as an apothecary unless he shall have been examined by the Court of Examiners and received a certificate that he is duly qualified; and section 21 says that no apothecary shall be allowed to recover any charges unless he shall prove on the trial

that he was in practice before 1815, or that he has obtained a certificate to practise. Both these sections are unrepealed. The attention of the Court of Common Pleas does not seem to have been drawn to the words "obtained a certificate to practise." I cannot think that this means that he should be allowed to obtain such a certificate after the date of his services.)

In *Haffield v. Mackenzie* the Irish Court of Exchequer, in a considered judgment, held that it was enough under section 32 that the plaintiff was registered on the day of the trial, and they ground their decision upon this—that they are not obliged to hold that the words "is registered" in the section mean "was registered."

(BLACKBURN, J.—The Apothecaries Act did not extend to Ireland.)

But the prohibitory words of section 32 of the Medical Act, which applies to Ireland, are practically the same as those in section 21 of the Apothecaries Act.

(QUAIN, J.—It would rather appear that in the Irish case the plaintiff at the date of his service was qualified by being a licentiate of the College of Surgeons.)

Patchett was not heard in reply.

COCKBURN, C.J.—The contention of the respondent is really quite hopeless. The Medical Act, 1858, intended that the right to recover, which is mentioned in section 32, should apply only to gentlemen who had passed the necessary examination. The unrepealed sections of the Apothecaries Act (55 Geo. 3. c. 194) (sections 14 and 21) were quite enough to prevent any apothecary from practising without a certificate, inasmuch as they said that he shall not recover unless he has obtained a certificate to practise.

BLACKBURN, J.—The old Apothecaries Act was enough to prevent the plaintiff from recovering in a case like the present unless he had obtained his qualification by examination. The Medical Act, section 32, adds to this requirement that of registration. It may be that a practitioner may procure himself to be registered at any time before trial, but he cannot cure his want of qualification at the time of the services mentioned.

QUAIN, J.—I am of the same opinion. As has already been pointed out, if it were otherwise the whole object of the Legislature would be defeated, and unqualified persons allowed to practise.

ARCHIBALD, J.—The Legislature cannot have meant that persons who practise medicine should be at liberty to qualify subsequently.

Judgment for the appellant.

CARPENTER v. HAMILTON

1877. June 23.

[37 L. T. 157]

The Medical Act 1858 (21 & 22 Viet. c. 90) s. 40, schedule (A)—Wilfully and falsely pretending to be a doctor of Medicine—Person describing himself as “Doctor of Medicine of the Metropolitan Medical College of New York”—Question of fact for decision of the magistrate.

The respondent kept a shop, where he dispensed medicine and gave advice; he had a diploma in the window, in which he was described as “John Hamilton, Doctor of Medicine of the Metropolitan Medical College of New York,” and he so held himself out to the world; and the magistrate reported that it was not satisfactorily proved that the respondent was not entitled so to describe himself. He was not registered, and held no qualifications which would entitle him to be registered under the Medical Act. The magistrate having dismissed a complaint brought against the respondent under section 40 of the Medical Act:

Held (by CLEASBY, B. and HAWKINS, J.), on appeal, that the decision of the magistrate was right, as the only evidence of any false pretence was, that the respondent pretended to be what he really was; and also that it was a question of fact for the magistrate’s decision rather than one of law for the Court.

CASE stated by Mr. Knox, a metropolitan police magistrate, under 20 & 21 Viet. c. 43.

Paragraphs 1, 2, and 3 stated that a complaint was preferred against the respondent and dismissed.

4. Upon the hearing of the said complaint it was proved on the part of the appellant, and found as a fact, that the respondent for some time past, and at the date of the occurrence of the offence charged, kept and keeps, a shop at No. 404, Oxford Street, within the jurisdiction of this Court, wherein he habitually dispensed and dispenses medicines, and gave and gives medical advice to patients.

5. I find furthermore, as a fact, that on the 18th October now last past, 1876, Benjamin Fordham, a detective officer of the E Division of the Metropolitan Police, went to the said shop No. 404, Oxford Street, and had an interview with the respondent, in the course of which the witness spoke with the respondent in respect of his bodily ailments, and the respondent prescribed for him, and supplied him with a bottle of medicine for which he paid the respondent the sum of 5s. 10d.

6. I find furthermore, as a fact, that the respondent kept and keeps in his shop window at the said house No. 404, Oxford Street, and in a conspicuous way, a large diploma in a frame, in which he is described as "John Hamilton, Doctor of Medicine of the Metropolitan Medical College of New York in the United States of North America," of the validity of which, beyond production, he gave no further proof.

7. I find as a fact that the respondent described himself, and held himself out to the witness and to the world substantially as Dr. John Hamilton, Doctor of Medicine of the Metropolitan Medical College of New York.

8. I find as a fact that the respondent's name does not appear in any register showing that he is registered under the Medical Act, and that he does not hold any qualification or diploma which would entitle him to be registered under the said Medical Act.

9. The question of law then arising on the above statement for the opinion of the Court, is whether or not, if, as on the facts as above stated, a man holds himself out as Dr. John Hamilton, Doctor of Medicine of the Metropolitan College of New York, and not otherwise, he can be held to offend against the 40th section of the Medical Act (21 & 22 Vict. c. 90), coupled with the 34th section of the said Act for interpretation of the words "recognised by law."

10. Or more generally, Does a man who actually practises medicine or the medical art, who holds himself out to the world as a medical graduate or the holder of a diploma of a foreign university or college and nothing else, come within the prohibition of the Medical Act (21 & 22 Vict. c. 90), s. 40?

11. I dismissed the said complaint, as I was of opinion that the respondent did not wilfully and falsely pretend to be or use the name of a doctor of medicine contrary to section 40 of the Medical Act, as he only represented himself to be, and used the name of, Doctor of Medicine of the Metropolitan Medical College of New York. It was not proved to my satisfaction that he was not entitled so to describe himself.

12. If the Court should be of opinion that I was right in point of law in dismissing the said complaint, judgment is to be given for the respondent, and if the Court should be of opinion that I was wrong in point of law, the case is to be remitted to me with the opinion of the Court thereon, so that I may convict the said respondent and impose on him such penalty as I may think fit.

Bompas, Q.C. (with whom was *Finlay*) for the appellant.—The Act was intended to prevent persons not registered from practising. Therefore by using the title of Doctor of Medicine of the Metropolitan Medical College of New York, the respondent

falsely pretends that his name is on the register. The magistrate was wrong in dismissing the charge, and he should have convicted the respondent of the offence charged against him.

Besley and Tickell for the respondent, contra.—The respondent need not be registered in order to practise. The Act only imposes certain disabilities on the unregistered, such as rendering them unable to recover their fees, or to be eligible for certain appointments (sections 32 and 36). The fact that such disabilities are mentioned shows that unregistered persons may practise. The respondent has no means of getting himself registered, not having practised here before the 1st of October 1858. By section 15 of the Act, the persons entitled to be registered are persons then possessed of, or who should thereafter become possessed of, any of the qualifications mentioned in schedule (A). That schedule contains eleven clauses, the first ten of which relate to practitioners with British or Irish qualifications, and the eleventh [to those with foreign or colonial qualifications]. It is a question of fact for the magistrate, and not a question of law for this Court, whether the respondent has committed the offence created by the statute.

Ladd v. Gould [ante, p. 8]; *Ellis v. Kelly* [ante, p. 21].

Bompas, Q.C. in reply.

CLEASBY, B.—We have to look at this case as it stands, and see what is the offence charged. The words follow those in the 40th section of the Act, and we may suppose all the words of that section to be put into the charge in the case. Now I do not like myself to deal with a question of fact, but how is it possible to make out a charge of falsely pretending to be something, when the only evidence is that the man pretends to be what he really is? Apart from the authorities referred to, it seems to me a question of fact, the decision of which the magistrate should not throw on the Court. It is the magistrate who has to determine whether there has been a false pretence or not, and, the complaint having been dismissed, the case is really disposed of.

HAWKINS, J.—I am of the same opinion, and think the decision of the magistrate should be upheld. The offence charged is under section 40 of the Act. Now, in order to understand this, we must see who are entitled to be registered. That depends upon section 15 coupled with Schedule (A). The schedule contains eleven descriptions of persons, the first ten of which we may dismiss as not applicable to the present case. The eleventh refers to persons with foreign or colonial qualifications. Now did the defendant pretend that he fell within the first head, or within the eleventh, as a “doctor of medicine of any foreign or colonial university or college, practising as a physician in the United

“ Kingdom before the 1st day of October 1858 ” ? If he did not, then he is not liable under this charge. The case expressly finds that he only represented himself to be, and used the name of, “ Doctor of Medicine of the Metropolitan Medical College of “ New York,” and the magistrate adds that it was not proved to his satisfaction that he was not entitled so to describe himself but there was no evidence to show that in using the words “ doctor of “ medicine ” he pretended that he practised as a physician in the United Kingdom before the 1st of October 1858. I give no opinion as to what would be the result if a fresh summons were taken out; but taking this case as it stands I think the respondent is entitled to our judgment.

Judgment for the respondent.

DAVIES v. MAKUNA

1885. April 22.

[54 L. J. (Ch) 1148]

Reported also :

29 Ch. D. 596 ; 53 L. T. 314 ; 50 J. P. 5 ; 33 W. R. 668.

The Medical Act (21 & 22 Vict. c. 90), ss. 32 and 40—*The Apothecaries Act* (55 Geo. 3. c. 194), s. 14—*Unqualified and unregistered practitioner—Right to sue.*

The defendant, a duly qualified medical practitioner, agreed with the plaintiff, an unqualified person, described in the agreement as a “ medical practitioner,” to serve the plaintiff in his profession as a medical practitioner at R., and not to practise during five years after the determination of the agreement within ten miles of R. In August 1884, the plaintiff determined the agreement, and now moved for an injunction to restrain the defendant from practising at R. :—Held, by PEARSON, J., that the use, by an unqualified person, in a private agreement with another medical man, of one of the titles mentioned in section 40 of the Medical Act, is not an offence within that section ; that the agreement, therefore, was not illegal ; and injunction granted accordingly.

On appeal, upon further evidence leading to the necessary inference that the plaintiff had attended patients in the way in which a medical practitioner ordinarily attends, and, in fact, acted as an apothecary :—Held, reversing PEARSON, J., that in so acting he was breaking the provisions of 55 Geo. 3, c. 194, s. 14, and that the agreement, being one to assist him in carrying on a business prohibited by that Act, was illegal, and could not be enforced.

The Act of 55 Geo. 3, c. 194 is not repealed by implication by the Medical Act, 1858.

Semble, an unqualified person may carry on the business of a physician, apothecary, or surgeon, if he does so by means of duly qualified assistants and does not himself act personally in any of those capacities.

Motion.

By an agreement dated the 1st of November 1883, and made between the plaintiff Idris Davies, therein described as "medical practitioner," of the one part, and the defendant Montague Makuna, "medical assistant," of the other part, for the consideration therein mentioned, the defendant agreed with the plaintiff that he would diligently serve the plaintiff as assistant in his profession as medical practitioner and accoucheur at Ystrad Rhondda, in the county of Glamorgan, for one year from the date of the agreement, and so on from time to time until the contract should be determined by either of the parties thereto in manner thereafter provided. And the plaintiff agreed to pay the defendant a salary at the rate of £100 a year, paid monthly, as an indoor assistant.

And it was thereby mutually agreed between the parties thereto that either of them should be entitled to put an end to the said term of service during the first or in a subsequent year thereof by giving to the other one calendar month's notice in writing.

And the defendant, for the consideration aforesaid, did thereby agree that he would not at any time during the continuance nor during the next five years after the determination of the contract of service (except with the written consent of the plaintiff) exercise or carry on the profession of doctor of medicine, surgeon, apothecary, or accoucheur, or any of them, at Ystrad Rhondda, or within ten miles in any direction, either on his own account, or in partnership with, or as assistant to, any other person or persons.

The defendant was a qualified medical practitioner, duly registered under the Medical Act (21 & 22 Vict. c. 90). The plaintiff was not.

In August 1884 the defendant's term of service was put an end to by notice from the plaintiff.

In September 1884 the defendant commenced practising as a doctor on his own account at Ystrad Rhondda.

On the 27th of November 1884, the writ in this action was issued, claiming an injunction to restrain the defendant from exercising or carrying on the profession of doctor of medicine,

surgeon, apothecary, or accoucheur at Ystrad Rhondda or within ten miles thereof.

The plaintiff now moved for an injunction in the terms of the indorsement on the writ.

The defendant alleged that in some informal way the plaintiff had assented to what he had done. This, however, was denied by the plaintiff.

The main question in argument was whether the plaintiff, who (it was admitted) was not qualified to be registered under the Medical Act (21 & 22 Viet. c. 90), was entitled to maintain the action.

The Act 55 Geo. 3, c. 194, s. 14, provides that, "To prevent
"any person or persons from practising as an apothecary without
"being properly qualified to practise as such from and after
"the 1st of August 1815, it shall not be lawful for any person or
"persons (except persons already in practice as such) to practise
"as an apothecary in any part of England or Wales, unless he
"or they shall have been examined by the Court of Examiners"
of the Apothecaries' Company, and have received a certificate from them.

Everitt, Q.C., and *St. John Clerke*, for the motion.—The defendant's covenant is sufficiently limited both as to time and space. The main objection to this action is that the plaintiff cannot maintain it, because he is not a duly registered medical practitioner under the Medical Act. No doubt the Apothecaries Act (section 14) absolutely prohibits an unqualified person from practising as an apothecary. But the language of the Medical Act is different. It only prevents an unqualified person from "recovering any charge" (section 32), and imposes a penalty upon him if he "wilfully and falsely" uses a title implying that he is registered under the Act (section 40). "There is no provision in "the Medical Act which in terms prohibits an unregistered surgeon "from practising" (*Haffield v. Mackenzie* [*ante*, at page 14]). That case was cited with approval in *Turner v. Reynall* [*ante*, page 70]. They also referred to 14 & 15 Hen. 8, c. 5; 55 Geo. 3, c. 194, ss. 20 and 21; and *Philpott v. St. George's Hospital* (*a*).

Gatey, for the defendant.—The plaintiff is not only an unregistered, he is also an unqualified, practitioner. In *Haffield v. Mackenzie* the plaintiff was a duly qualified person; and it was held that the plaintiff, though not registered at the time of attendance, was entitled to maintain the action if registered at the time of trial. *Turner v. Reynall* is to the same effect.

The plaintiff describes himself in the agreement as a "medical practitioner." That is a description "implying that he is

“registered” under the Medical Act (section 40). No one is recognised as a “practitioner in medicine” under that Act other than the persons mentioned in schedule (A).

It is part of the ordinary business of a medical practitioner “to dispense medicines”; it is unlawful for the plaintiff to do this, as he has not obtained a certificate under the Apothecaries Act.

This is practically an action for the specific performance of the agreement, and the Court will not assist the plaintiff in enforcing an illegal agreement and one in restraint of trade (Pollock on Contracts, 3rd ed. p. 326, *Hitchcock v. Coker* (b), and *Horner v. Graves* (c)). He also referred to 3 Hen. 8, c. 11, ss. 1 and 2.

Everitt, Q.C., in reply.—There is no evidence that the plaintiff has ever practised as an apothecary. The Medical Act does not prevent the plaintiff from describing himself as a “medical practitioner”; he does not hold himself out as a “qualified medical practitioner.” He also referred to *Rousillon v. Rousillon* (d).

PEARSON, J. (on March 18).—The first question I have to determine is, what does the Medical Act, 1858 order, and how far does it leave persons at liberty, notwithstanding the provisions contained in it? I do not think it necessary to recur to the interesting old Act of Parliament to which Mr. Gatey’s industry referred me. I think it is quite sufficient for me to begin with the Act of Geo. 3. (His Lordship, after reading section 14 of the Act, continued:) There is, therefore, in that Act an express prohibition against any person acting as an apothecary except one who is qualified according to the Act.

But when I come to the Act of 1858, I find that it begins with this preamble:—“Whereas it is expedient that persons requiring “medical aid should be enabled to distinguish qualified from “unqualified practitioners.” Now, to my mind, that preamble shows what the whole purport of the Act was, and the extent to which its provisions were intended to go. It is not an Act to prevent unqualified practitioners from practising, but it is an Act to enable the public to distinguish between qualified and unqualified practitioners. Section 32 takes away from an unqualified practitioner the power of recovering any fees. But if it had been intended to prevent any unqualified practitioner from practising, that section would have been unnecessary; in that case it would only have been necessary to prohibit any such person from practising.

The only other section to which I need refer is section 40.

(b) 6 Ad. & E. 438; 6 L. J. (Ex.) 266.

(c) 7 Bing. 735.

(d) 49 L. J. (Ch.) 338; L. R. 14 Ch. D. 351.

That section, certainly, is difficult to understand, and I do not mean to say that I am absolutely certain what is the proper construction of that section; but, looking at the preamble of the Act, and at section 32, I think it means this—that, in order to incur the penalty, a person must wilfully and falsely take or use one of the names or titles therein mentioned in such a manner as is calculated to deceive the public. I do not think that the use of one of those titles by an unqualified practitioner either in a private agreement with another medical man, or (as was alleged here) upon a brass plate in a room not exposed to the public view, would be an infringement of this section. I cannot say why the provisions of the Act were limited in the way I have referred to. Possibly it was not thought necessary to prevent all unqualified persons from practising; and it may well be that the Legislature, knowing the habits and customs of the English people, was willing to leave a wide door open, especially to persons of the other sex, such as rectors' wives, and “Ladies bountiful,” who, with little experience and large benevolence, delight to administer medicines to the poor. But, however that may be, I do not see that it has been brought home to the plaintiff that he has done anything improper, although he is not—and cannot be as matters stand, because he has not the necessary qualifications—registered as a qualified practitioner under this Act.

This, I think, decides the whole question between the parties; for if that be so, there was no reason why he should not enter into this agreement with the defendant; and there is no reason why the defendant, having entered into this agreement, should not keep it.

I must, therefore, grant the injunction asked for; and with costs.

It was then arranged that the operation of the injunction should be suspended, pending an appeal, the defendant undertaking to keep an account.

The defendant appealed.

On the hearing of the appeal, fresh evidence was put in on behalf of the defendant, showing that during 1884 the plaintiff had signed no less than twelve certificates of deaths to be delivered to the Registrar under the Registration Act, 1874, by each of which he certified, though without representing himself as a qualified practitioner, that he had attended the deceased during his last illness, and stated the cause of death. The causes of death mentioned in the certificates included among others meningitis, phthisis, cardiac disease, diarrhoea, apoplexy, pneumonia, and convulsion.

Other evidence was given that the plaintiff had, on the 30th of March 1885, been convicted and fined at the Petty Sessions for

assuming the title of doctor of medicine. The plaintiff, however, was taking steps to appeal, being advised that the conviction was erroneous, the assumption of title having been by inadvertence. The plaintiff further deposed that his assistants, who were duly qualified apothecaries, invariably attended to that portion of the practice which involved acting as apothecary, and that as he—not being registered an apothecary—did not compound or dispense medicines, he required the assistance of duly qualified practitioners.

Gatey, for the appellant.—The agreement is illegal, in the first place, as a restraint of trade, and not made on good consideration (*Collins v. Locke* (e)). An unqualified practitioner cannot by this means restrain one who is duly qualified from practising.

(FRY, L.J.—That turns on the question whether he can (if unqualified) legally employ other qualified medical men to carry on business for him.)

The plaintiff's main business has been to carry on, in person, business as a medical man. The agreement, then, is one to carry on an unlawful business, and would be illegal. Under the Act of 55 Geo. 3, c. 194, s. 14, an unqualified person is prohibited from practising as an apothecary. The qualifications of surgeon and physician depend on a series of Acts. The first, 3 Hen. 8, c. 11, which prohibits any one from practising in London as a physician or surgeon unless examined or approved as therein mentioned—namely, in London by the Bishop, or Dean of St. Paul's, and in the country by the bishop of the diocese. The Act of 32 Hen. 8, c. 42 established a corporation of barbers and surgeons. Then came the charter of 5 Car. 1, which is recited in 18 Geo. 2, c. 15.

These Acts made it illegal for any unqualified person to practise as a surgeon or apothecary, and they have not been repealed by the Medical Act, 1858, and therefore the prohibition is still in force. *Dallax v. Jones* (f) treats 3 Hen. 8, c. 11 as still in existence. Then the Medical Act, 1858 provides for registration of qualified persons in respect of their qualifications, but does not in any way remove the restrictions upon unqualified persons. See sections 15, 30, 31, 32, and 40.

The Acts making it illegal for the plaintiff to practise as a doctor of medicine, or a surgeon, or an apothecary, he cannot restrain the defendant from doing what he may not do himself.

Haffield v. Mackenzie, which was relied on below by the plaintiff, was cited but was not followed in *Leman v. Houseley* (g).

In the agreement the plaintiff describes himself as a “medical

(e) L. R. 4 A. C. 674.

(f) 26 L. J. (Ex.) 79.

(g) [*ante*, page 95.] And see *Leman v. Fletcher* [*ante*, page 92], where it was decided that the 55 Geo. 3, c. 194, s. 21, was not repealed by the Medical Act, 1858.

“praetitioner,” which is one of the terms used in section 40 of the Medical Act, the user of which by an unqualified person constitutes an offence under the Act.

The statute 34 & 35 Hen. 8, c. 8 does enable the “Ladies bountiful” referred to by PEARSON, J., to administer drugs not for gain.

Everitt, Q.C., and *St. John Clerke*, for the plaintiff.—Throughout the whole Act of 1858 there is no prohibition analogous to that in section 14 of 55 Geo. 3, c. 194; it becomes a mere question of penalty. The later Act contains a whole series of clauses which provide for registration, and unless a person is registered he cannot sue.

55 Geo. 3, c. 194, no doubt is still in force, but the plaintiff has not infringed it; he does not carry on the business of an apothecary, but employs properly licensed persons. The Act of 3 Hen. 8, c. 11, has been, if not expressly, yet impliedly, repealed, or at any rate has fallen into desuetude. It was superseded as to physicians by 14 & 15 Hen. 8, c. 5. In the Act of 3 Hen. 8, c. 11, “surgeon” is nothing more than “physician,” as is shown by reference to 32 Hen. 8, c. 40, s. 3. Then the Act of 14 & 15 Hen. 8, c. 5, has been virtually repealed by the 23 & 24 Vict. c. 66.

The persons qualified to practise are given in the Act of 1858, section 15, and see schedule A; and the scheme of registration or qualification introduced by the Act assumes that the Acts prescribing the method of obtaining qualifications are no longer in force.

Then there are at any rate some branches of medical work in which the plaintiff may engage.

COTTON, L.J.—This is an appeal by the defendant to discharge an order of Mr. Justice PEARSON granting an injunction to compel him to abide by a covenant into which he has entered with the plaintiff. The covenant certainly has been broken, and we cannot look with any favour on the conduct of the defendant; but we must consider whether it will be in accordance with the principles on which this Court acts to enforce the performance of this covenant.

The plaintiff was carrying on a business as a medical practitioner at Rhondda, in Wales, and advertised for a duly qualified practitioner as an assistant. The defendant, who is a duly qualified person, answered the advertisement, and entered into a written agreement that he should act as assistant to the plaintiff in his business as medical practitioner and accoucheur at a yearly salary, the engagement being determinable by either party at a month’s notice; and the defendant stipulated that he would not

during the continuance of the engagement, or within five years after its determination, except with the written consent of the plaintiff, exercise or carry on the profession of doctor of medicine, surgeon, apothecary, or accoucheur at Rhondda, or within ten miles of it. In August 1884, the engagement was determined, and in the following month the defendant commenced practising as a doctor of medicine at Rhondda.

The ground on which the injunction is resisted is this : It is said that the agreement is that the defendant should assist the plaintiff in carrying on a business which was certainly to a great extent one which he could not legally or properly carry on, and that the agreement is therefore void for illegality. The plaintiff admits that he was not qualified so as to be entitled to act as physician, surgeon, or apothecary ; but it was suggested on his behalf that though not personally qualified, he does as a centre carry on those branches of his business, not personally, but by means of duly qualified assistants, who would be his agents. If such were really the case, and this covenant had been entered into, my opinion is that the defendant could not have objected to being bound by that covenant into which he had entered, especially when he was aware of the state of the case before entering into it. I think that in that case the plaintiff would have been engaged in a work which is not prohibited. But is that the case here ? In my opinion, upon the evidence before the Court, that does not appear to be the case.

I will not go into the question as to whether the Act of 3 Hen. 8, c. 11, is still in force so far as it prohibits and imposes a penalty upon any one acting as a surgeon without the qualification, required by it. But it is clear that the Act of 55 Geo. 3, c. 194, s. 14, will prevent any unqualified person acting as an apothecary. The Act does not define precisely what acting as an apothecary is, but it must cover the mixing and dispensing of medicines, and includes attendance and the giving of advice, which would be given by a physician, who does not dispense medicine.

It is alleged in the present case that the plaintiff, although he is not qualified, is himself carrying on the business of an apothecary, and comes within the prohibition of this statute ; and in his evidence he makes a professional boast in producing certain certificates from persons who are not authorised to give qualifications in this country to show that he is competent to act as a medical practitioner. But still those certificates do not make him capable of acting as a surgeon in England. He also keeps a brass plate in his room, on which he is described as " Physician and Surgeon." It is true that the plate is not exposed, but is only to be seen by the persons who go into that room.

Still these facts do tend to show that he is not acting merely as a centre of a duly qualified staff of assistants whom he enables to act by supplying the necessary capital, but is himself carrying on the business of the medical profession in various forms. Moreover, he is described in the agreement as acting as medical practitioner.

Then an affidavit, which was not before Mr. Justice PEARSON, has been filed by the defendant, giving a series of cases where he gave certificates of death, such certificates stating that he attended them and the causes of death. (His Lordship read several of the certificates where death had been caused by convulsions, pneumonia, diarrhoea, &c., and proceeded :) In my opinion, the proper result is that the plaintiff is personally carrying on the business which, under English Acts of Parliament, he is not entitled to carry on.

Ought we then to interfere at his instance, even though the covenant may extend to include certain acts which he is not debarred from performing? In my opinion we ought not—we certainly ought not at this stage—to grant the injunction as it was granted by Mr. Justice PEARSON.

It appears that the whole facts of the case were not before the learned Judge, and he seems to have decided this question merely on the construction of the Medical Act, 1858. If there had been no other Act in the case I should have been disposed to agree with him. But I think that, as the evidence at present stands, the plaintiff must be taken to have been carrying on a business which the Act 55 Geo. 3, c. 194 prohibited him from carrying on; that the agreement is illegal; and that he is not entitled to the injunction he asks for.

LINDLEY, L.J.—I have arrived at the same conclusion. If it were necessary to spell out the extent to which the old Act of 3 Hen. 8, c. 11, is still in force, I should desire to take more time before deciding. I cannot at present satisfactorily completely dovetail it in with the other Acts. But I leave that statute out of consideration. The agreement itself must be looked to; and, first, the agreement describes the plaintiff as a medical practitioner, and the evidence shows what kind of business he in fact carried on, and I refer more particularly to the important affidavit to which Lord Justice Cotton has referred, and to the schedule annexed to that affidavit, as showing that the business was the ordinary business of a medical practitioner, including surgery and physicians' and apothecaries' work. The object of this agreement was to secure the services of the defendant as an assistant in that business; and one of the covenants, which is the covenant sued on, was to prevent the defendant from carrying on a similar business for a certain time within a certain distance from Rhondda.

It is obvious, to my mind, that the object of the agreement was to enable the plaintiff to carry on the business which he was prohibited by the Act of 55 Geo. 3, c. 194 from carrying on without being qualified; and I think that, according to the principle on which the Court acts, he is not entitled to an injunction.

FRY, L.J.—I also am unable to agree with the judgment of Mr. Justice PEARSON. The principal part of the agreement is to the effect that Makuna agrees with Davies that he, Makuna, will serve Davies as his assistant in his profession of medical practitioner and accoucheur, which was the profession as carried on by Davies. If the plaintiff, as was suggested on his behalf, carried on the business as a capitalist by the means of duly qualified assistants, I am far from convinced that this agreement would be held to be bad. But I come clearly to the conclusion that he was himself acting as if he were a qualified practitioner; and, if so, the agreement was that the defendant should assist the plaintiff in a business which the plaintiff was not entitled to carry on; and I do not think we can assist the plaintiff by granting him an injunction. It may be that the covenant, relating as it does to certain parts of his business which he is able to carry on, is distributable, and that at the hearing of the case the Court may grant the plaintiff some assistance—I am by no means saying that it will, but it may do so. But I am clear upon this, that in the present state of circumstances, bearing in mind that this is an interlocutory process, we should be doing wrong if we were now to give the plaintiff the assistance he asks by way of injunction.

Appeal allowed, with costs here and below.

HOWARTH v. BREARLEY

1887. June 11.

[56 L. J. (Q. B.) 543.]

Reported also :

19 Q. B. D. 303; 56 L. T. 743; 51 J. P. 440; 36 W. R. 302.

Medical Practitioner—Unqualified person—Right to sue—Medical Act, 1858 (21 & 22 Vict. c. 90), s. 32—Apothecaries Act, (55 Geo. 3, c. 194), s. 14.

A duly qualified medical practitioner cannot recover in an action for attendances made upon and medicines supplied to a patient by an unqualified assistant, when he himself has never seen the patient nor supervised the services so rendered.

This was an appeal from the decision of the Judge of the Court of Record for the Hundred of Salford, in the county of Lancaster, nonsuiting the plaintiff. The motion was that the nonsuit directed by the Judge be set aside and judgment entered for the plaintiff, or that a new trial be ordered, upon the grounds that (1) the learned Judge was wrong in point of law in holding that the plaintiff was not entitled to recover unless he proved that medicines or medical attendances were rendered personally by the bankrupt John Louis Fitzmaurice to the defendant. (2) That the plaintiff was in law entitled to recover for medicines supplied and medical services rendered to the defendant by Joseph Alphonso Fitzmaurice, as the assistant and agent of the bankrupt John Louis Fitzmaurice. (3) That on the admitted facts judgment should have been entered for the plaintiff.

The facts were, that John Louis Fitzmaurice, being duly qualified, set up in business as a medical practitioner in Bury; at the same time he set up a branch business at a neighbouring village, which was conducted by Joseph Alphonso Fitzmaurice, who was not qualified. John Louis Fitzmaurice became bankrupt, and this action in the Hundred Court was brought by his trustee in bankruptcy against the defendant for medical attendance.

From the notes of the learned Recorder it appeared that at the trial counsel for the plaintiff admitted that he could not prove that John Louis Fitzmaurice rendered any services personally to the defendant, and that John Alphonso Fitzmaurice who rendered the services in question had no qualification at all. The learned Judge accordingly sustained an objection taken by counsel for the defendant that under 21 & 22 Vict. c. 90 the plaintiff could not recover, since the attendances had been made by an unqualified person, and directed a nonsuit.

Chitty, for the plaintiff (the appellant).—Apart from the Medical Act, 1858, an employer is entitled to recover for services rendered by his servant, and unless there is something in this Act which prevents such employment of an unqualified assistant it is submitted that such a person may be employed. In fact, the statute only goes to this, that a person who is not registered shall not sue (section 32). It does not provide that he shall employ a qualified assistant. Here the person who brought the action was properly qualified and registered.

(DENMAN, J.—If you are right a doctor may send his butler to visit his patients and yet recover his charges.)

Unless the patient can show that the services were worthless it is submitted he could do so.

Had the Act intended that the qualified practitioner should employ only a qualified assistant, a provision to that effect would have been inserted, as it was in the Apothecaries Act (55 Geo. 3, c. 194).

It has been held that it is sufficient if an unqualified practitioner procures a certificate before the date of the trial (*Turner v. Reynall* [*ante*, page 70]).

Also, that an unregistered assistant may sue a registered practitioner for salary (*De la Rosa v. Prieto* [*ante*, page 82], *Haffield v. Mackenzie* [*ante*, page 10], *Leman v. Houseley* [*ante*, page 95], and *Davies v. Makuna* [*ante*, page 103]).

It is submitted that whenever a case can be brought within the Apothecaries Act (55 Geo. 3. c. 194), the employment of an unqualified assistant is illegal, but that it is not so if it happens, as it does here, that the case only comes within the Medical Practitioners Act, 1858. The Judge at the trial should have gone into the question of the nature of the services rendered, and if it were shown that they were of a surgical nature the plaintiff ought to have recovered. Again, there is a question whether a case of this kind can be distinguished from the case of a solicitor who acts by his clerk.

(LORD COLERIDGE, C.J.—But the clerk only does clerk's work.)

C. A. Russell, for the defendant.—The plaintiff cannot recover for these attendances. Admitting that a properly qualified practitioner may carry on parts of his business by an unqualified person, it is submitted that here, at any rate, the plaintiff is not entitled to recover for services afforded by an unqualified person which should have been rendered personally, or at any rate under the supervision of a properly qualified medical man.

(At this point he was stopped by the Court.)

LORD COLERIDGE, C.J.—In this case we have to decide whether or not a nonsuit has been properly directed by the Judge of the Salford Court.

It seems that two people named Fitzmaurice carried on a business. One of them, J. L. Fitzmaurice, was duly qualified and registered as a medical practitioner, whilst the other, Alphonso Fitzmaurice, was neither qualified nor registered. These two persons stood in some sort of relationship to one another, either as partners or as master and servant. The qualified person brings an action for medical attendance upon the defendant, no part of which was afforded by him, nor did he ever appear at the patient's residence.

When I speak of rendering personal attendance I am not to be understood to mean services physically rendered, for there

may possibly be cases in which a properly qualified person being at hand, and really directing the attendances and prescribing the medicines, can recover though he has not seen the patient. The unqualified person may, under certain circumstances, be the hand employed and guided by the directing brain of the qualified person (a).

I fully concede the cogency of the contention of the plaintiff's counsel so far. But I have to deal with an Act of Parliament which seems to me to put an end to the case, for it enacts that no person shall be entitled to recover any charge in a Court of Law unless he be registered.

Here the plaintiff was duly registered, but his action is for medical attendance which he personally did not render. Now having explained what I consider to be the meaning of services personally rendered, I find that the learned Judge has found that at the trial before him the plaintiff's counsel admitted that the registered partner or master rendered no services at all. Accordingly there was no attendance by the person bringing the action upon the patient. He cannot bring an action for work he has not done. I am clearly of opinion that a proper conclusion has been arrived at under the 32nd section, and that in directing the non-suit the learned Judge was perfectly right. Nor do I find the cases cited, in conflict with his decision.

In the case of *De la Rosa v. Prieto*, the Court of Common Pleas held that an unregistered practitioner could not himself bring an action for services rendered to a registered practitioner. There the registered practitioner had gone away and left his patients to the other, and the Court held that this person being unregistered could not bring the action.

Then as to the case of *Turner v. Reynall*, if it is in conflict with *Leman v. Houseley*, it must be taken to have been overruled by the latter case.

In the former of these cases it seems to have been held that if a medical practitioner be duly registered at the time of the trial of the action he would be entitled to maintain an action for attendances and medicines, though not registered at the time they were afforded and supplied.

I have no difficulty in saying that the judgments in the latter case of *Leman v. Houseley* are more satisfactory, and if they are in conflict with those in the former case they must prevail.

DENMAN, J.—I am quite of the same opinion; and with regard to any conflict between *Turner v. Reynall* and *Leman v. Houseley*, if such conflict exists, I agree with the remarks just made by the Lord Chief Justice.

(a) [See Introduction, *ante*, pages xxvi, xxvii.]

Here an action has been brought by a qualified medical practitioner for services rendered and medicines supplied, and he must make out that he has rendered such services and supplied such medicines. This he does not do, but shows that another person has done the work for him without consultation with him. Can it be urged that this is a compliance with the 32nd section of the Medical Practitioners Act, 1858 ?

Looking at the provisions of that Act I do not think it is competent to a medical man to give a roving commission to another, and in this instance an unqualified person, to do work in his name, and then sue the patient so attended. To permit such a state of things to go on would be contrary to the clear intention of the Act. Again, so far as this case is concerned, it would be a mockery and misuse of the words "master and "servant" to hold them to be applicable under the circumstances detailed. The nonsuit directed by the learned Judge must be sustained and this appeal dismissed.

ATTORNEY-GENERAL *v.* THE APOTHECARIES' HALL OF IRELAND

1888. *March 3rd.*

Reported : 21 L. R. (Ir.) p. 253.

See also Minutes of General Medical Council :

Vol. XXIII. (1886) p. 145.

Vol. XXIV. (1887) pp. 84, 107, 237, 262, 265 & 279.

Medical Act, 1886, s. 3, sub-sec. 1 (b)—Medical corporation capable of granting a diploma in respect of medicine.

The proceedings in this case were brought in order to ascertain by judicial decision whether the Apothecaries' Hall of Ireland was at the passing of the Medical Act, 1886, a medical corporation qualified to grant independent diplomas in medicine.

After the passing of the Act a scheme had been adopted by the Apothecaries' Hall and the College of Surgeons in Ireland of conducting in combination qualifying examinations in medicine, surgery and midwifery under the Act. In furtherance of this scheme the Apothecaries' Hall had requested the General Medical Council to appoint an examiner in surgery and an examiner in medicine to assist at the examination in accordance with the provisions of the Act. There had been a proposal to the King's and Queen's College that they should co-operate in a joint scheme and similar proposals had been made to the University of Dublin and the Royal University of Ireland. Each of these three bodies

had declined the proposals. There had been some correspondence between the bodies and the General Medical Council but no arrangement had been found possible.

The King's and Queen's College now applied for an injunction to restrain the scheme from being carried into effect and evidence was filed on both sides on the question of the sufficiency or insufficiency of the curriculum of the Apothecaries' Hall in respect of the qualification of a physician.

VICE-CHANCELLOR CHATTERTON refused to grant an injunction. He held that the question which he had to decide was one of law only and that on the true construction of the Acts of 1858 and 1886 the Apothecaries' Hall was capable of granting a diploma in respect of medicine. Whether or not the standard of proficiency was being maintained was a question for the General Medical Council who could appeal to the Privy Council should they deem such standard insufficient.

Note.—It has not been possible to reprint a report of this case in the present volume, but it will be found—as stated above—in 21 Law Reports (Ireland), page 253, to which the reader is referred.

ALLBUTT v. GENERAL MEDICAL COUNCIL (*)

1889. *July 6.*

[58 L. J. (Q. B.) 606]

Reported also :

23 Q. B. D. 400 ; 61 L. T. 585 ; 54 J. P. 36 ; 37 W. R. 771.

See also Minutes of General Medical Council :

Vol. XXIV. (1887) 122, 123, 307 to 313, 316, 317, 355, 408, 445, 450.

Vol. XXVI. (1889) 181, 182, 183, 223.

Libel—Privilege—Publication of matter of public interest—The Medical Registration Act, 1858 (21 & 22 Vict. c. 90), s. 29.

The publication by the General Council of Medical Education and Registration of their resolution giving the grounds of their directing, under section 29 of the Medical Registration Act, 1858, the erasure of the name of a medical practitioner from their register for conduct in their opinion infamous, is privileged, if made in good faith and without improper motive.

Ex parte La Mert [ante, page 81], deciding that the Council are the sole judges of the question of conduct, approved.

(*) *Coram* Lord Coleridge, C.J., Lindley, L.J., and Lopes, L.J.

Appeal of the plaintiff from the judgment of POLLOCK, B., in favour of the defendants at the trial with a jury.

The plaintiff's claim was for a writ of *mandamus* to restore his name in the Medical Register, and damages for removing it therefrom ; and secondly, an injunction against and damages for printing and publishing of him that he had been guilty of infamous conduct.

The defence was, as to the first head of claim, that the plaintiff, after due inquiry, was adjudged by the defendants to have been guilty of infamous conduct in a professional respect ; and as to the other, that the words complained of were published on a privileged occasion.

On and before the 25th of November 1887, the plaintiff was registered as a medical practitioner under the Medical Registration Act, 1858 (21 & 22 Vict. c. 90). On that day the defendants passed the following resolution : " That in the opinion of the Council Mr Henry Allbutt has committed the offence charged against him—that is to say, of having published and publicly caused to be sold a work entitled *The Wife's Handbook*, in London and elsewhere, and at so low a price as to bring the work within reach of the youth of both sexes, to the detriment of public morals. That the offence is, in the opinion of the Council, infamous conduct in a professional respect." Afterwards the defendants erased the plaintiff's name from the Medical Register, and published their resolution in a book entitled *Minutes of the General Medical Council*, indexed " H. A. Allbutt, his name erased from the Medical Register, 317."

Jelf, Q.C., and *Macaskie*, for the plaintiff.—Publishing the book was not infamous conduct in a professional respect, as required by section 29 of the Medical Act, 1858 ; nor has there been due inquiry. *Ex parte La Mert* (a) is distinguishable. The plaintiff's name ought to be restored, and damages given for the injury done. The publication of the resolution in the minutes of the Council was a libel. The General Council is not a Court, and a report of its proceedings is not privileged. In any case, the question whether the report was fair ought to have been left to the jury.

They relied on *Purell v. Sowler* (b) and *Oliver v. Bentinek* (c).

The Attorney-General (Sir R. E. Webster), *Kennedy*, Q.C., and *M. J. M. Maekenzie*, for the defendants.—The first point was decided in 1863 by the Court of Queen's Bench in the case of *Ex parte La Mert*, in which it was held that the Council

(a) [*Ante*, page 81.]

(c) 3 Taunt. 455.

(b) 46 L. J. (C. P.) 308 ; L. R. 2 C. P. D. 215.

are sole judges of the question whether a medical practitioner has been guilty of infamous conduct.

(They were stopped on this point.)

The defendants were bound to keep their minutes, and were bound to publish them for the information of the public. They have published a report of quasi-judicial proceedings without comment and with good faith.

They referred to *Stoekdale v. Hansard* (d), *Cooper v. Lawson* (e) *Henwood v. Harrison* (f), *Usill v. Hales* (g), *Cox v. Feeney* (h), *Williams v. Smith* (i), and *Barrows v. Bell* (k), an American case.

Jelf, in reply.—The duty of the defendants was complete when they erased the plaintiff's name.

Cur. adv. vult.

LOPES, L.J., on July 6, delivered the judgment of the Court, as follows:—The plaintiff complains that the defendants (the General Council of Medical Education and Registration of the United Kingdom) have wrongfully and unlawfully erased his name from the Medical Register, and asks for a *mandamus* commanding the defendants to restore his name on the Register. The plaintiff also complains that the defendants have libelled him by printing and publishing of him in a book, entitled *Minutes of the General Medical Council*, that his name had been erased from the Medical Register, p. 317, and that in the opinion of the Council the plaintiff had committed the offence charged against him—that is to say, of having published and publicly caused to be sold a work entitled *The Wife's Handbook* in London and elsewhere, and at so low a price as to bring the work within the reach of both sexes, to the detriment of public morals, and that the offence was, in the opinion of the Council, infamous conduct in a professional respect. With regard to the erasure of the plaintiff's name, the plaintiff says the defendants acted without jurisdiction, that there was no evidence of any infamous conduct in a professional respect, and therefore nothing upon which to found their jurisdiction. The defendants say, on the other hand, they lawfully, and in the exercise of a jurisdiction conferred upon them by Act of Parliament, struck the plaintiff's name off the Register; and that, as there was jurisdiction to enter upon this inquiry, they (the Medical Council) are the sole judges of what was done during the inquiry which they had jurisdiction to initiate. The learned Judge thought there was

(d) 9 A. & E. 1; 8 L. J. (Q. B.) 294. (e) 8 A. & E. 746; 8 L. J. (Q. B.) 9.

(f) 41 L. J. (C. P.) 206; L. R. 7. C. P. 606.

(g) 47 L. J. (C. P.) 323; L. R. 3 C. P. D. 319.

(h) 4 F. & F. 13.

(i) 58 L. J. (Q. B.) 21.

(k) 7 Gray Mass, 301.

no evidence of any of the complaints which he ought to leave to the jury, and gave judgment for the defendants. The section upon which the Council have acted in erasing the plaintiff's name is the 29th section of 21 & 22 Vict. c. 90, which says:—
 “If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the Registrar to erase the name of such medical practitioner from the Register.” Having regard to the nature of the complaint, the Council clearly had jurisdiction to enter upon the inquiry, and, having that jurisdiction, are constituted by the Legislature the sole judges whether that complaint was substantiated. To use the words of Chief Justice Cockburn in *Ex parte La Mert (a)*, “This Court has no more power to review their decision than they would have in the present mode of proceeding of determining whether the facts had justified a conviction for felony or misdemeanour under the first branch of the section.” It is said by the plaintiff that there was no “due inquiry,” and that that question ought to have been left to the jury. We think that there was no evidence of any absence of a due inquiry which ought to have been left to the jury. All charges of *mala fides* were withdrawn, and it was admitted the Council acted honestly and without any improper feeling or motive towards the plaintiff. We can find nothing irregular in the proceedings of the Council; the plaintiff had every opportunity afforded to him of bringing his case before the Council, who heard his counsel and his evidence and adjudicated thereon.

With regard to the alleged libel, questions of greater difficulty arise, and questions of grave importance. The defence of the Council is that they published what is complained of *bona fide* and without malice, and in circumstances which constituted the same privileged. The libel complained of is published in a book containing the Minutes of the General Medical Council, and is part of the report of the proceedings of the Council in the plaintiff's case. It is most material to bear in mind that it is admitted that the report is truthful, accurate and honest, published *bona fide* without malice—not an *ex parte* report, but a report of facts which have been finally ascertained and adjudicated upon. To determine whether such a report is privileged, it is important to consider the position, powers and duties of the Medical Council. The Council is not a private association. They are a public corporation, invested with large powers and privileges, and charged with important duties—duties in which

not only the profession but the public at large are interested. They are authorised to hold *quasi-judicial* inquiries—inquiries involving the status and character of professional persons, members of their own body, involving the rights of those persons towards the public, and the rights of the public towards them. There is no appeal from their decision, and the influence of public opinion is no small safeguard against the abuse of the powers intrusted to them. This influence cannot be exercised if they keep secret the grounds on which they act. The public are clearly interested in knowing these grounds. The preamble of the Act states that it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners. The Council, by section 10, has power to appoint Registrars, who are to keep correct Registers, and in every year to cause to be printed, published and sold, a correct Register, a copy of which is made evidence in all Courts. Sections 28 and 29 give the Council power to erase names from the Register. Sections 31 and 32 deal with the privileges of registered persons, enabling those registered to sue, and disentitling those not registered from suing for their charges. By section 34 “legally qualified medical practitioner” is to be construed to mean a person registered under the Act. Section 35 exempts registered persons from serving on juries. By section 36, unregistered persons are disqualified from holding a large number of appointments. Section 37 declares that no certificate required from any medical practitioner shall be valid if the person signing it is not registered. These provisions show how important it is that not only the profession but the public should have accurate information as to the proceedings of the Council, should know who is on the Register, who is entitled to sue for charges, who is exempted from serving on juries, who is entitled to hold those public appointments for which medical men are eligible, and who can sign valid certificates.

Again, it is important if a person's name is erased that accurate information should be given to the public of the cause of its erasure. The medical man whose name is erased is not disqualified from practising, and old patients and other medical men invited to meet him in consultation might reasonably desire to know the nature of the offence in respect of which the erasure was made, in order to determine whether they would still continue to employ or meet him. This they could not learn from the Register itself, but could learn from the proceedings of the Council, as appearing in the book containing the report complained of. We are of opinion that the Medical Council would in many cases fail in discharging their social and moral duties

to the public if they shrank from the responsibility of making known to the public the grounds on which they have removed a man's name from the Register, and thereby converted him from a qualified into an unqualified practitioner. Can it be said that a fair, honest, and accurate report of such proceedings is not privileged? If this had been an impartial and accurate report of a proceeding in a public Court of law, it would have been beyond all doubt privileged. The reason of this privilege is thus stated by Mr. Justice Lawrence in *The Queen v. Wright* (l): "The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." Lord Chief Justice Cockburn uses language almost identical in *Wason v. Walter* (m), and Mr. Justice Willes, in *Henwood v. Harrison* (j), says: "The principle upon which these cases are founded is a universal one, that public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

It seems to us, having regard to the nature of the tribunal, the character of the report, the interest of the public in the proceedings of the Council, and the duty of the Council towards the public, that this report stands on principle in the same position as a judicial report. It would be stating the rule too broadly, in our opinion, if it was held that, to justify the publication of proceedings such as these, the proceedings must be directly judicial or had in a Court of justice. We can find the law nowhere so broadly stated, nor do we think in these days it would be so laid down. The Court must adapt the law to the necessary condition of society, and must from time to time apply as best it can what it thinks is the good sense of rules which exist to cases which have not been positively decided to come within them. We have said that we can find no direct authority against holding this publication privileged. We do find, however, authorities which, in our opinion, favour the contention of the defendants that the rule of privilege extends to proceedings such as these. *Purcell v. Sowler and others* (b) was a case decided by the Appeal Court in 1877. It was held that the administration of the poor law, both by the government department and by the local authorities, including the conduct of the medical officers, is a matter of public interest, but that the publication of a report of proceedings at a meeting of poor law guardians at

(l) 8 Term Rep. 298.

(m) 38 L. J. (Q. B.) 34; L. R. 4 Q. B. 73.

which *ex parte* charges of misconduct against the medical officer of the union were made, is not privileged by the occasion. The proceedings in this case were before a board of guardians, and were clearly not judicial. They were, however, *ex parte*, and on that ground only were held not privileged. Lord Chief Justice Cockburn, after stating that proceedings in Courts of law and proceedings in Parliament are privileged, although statements may have been made prejudicially affecting the character of private individuals, proceeds thus:—"Many intermediate cases may be put. Take the meetings of the Corporation of London. The discussion at such meetings might involve strong observations upon the conduct of particular individuals. So also as to the municipal councils of other cities and boroughs; so again as to meetings of magistrates at Quarter Sessions, not as Courts of justice, but for transacting the business of their county. In all these cases I should be sorry to lay down as law that the proceedings of such meetings may not be fully reported, although the character of private individuals may be inadvertently attacked. But it is unnecessary for the decision of the present case to lay down any such rule, and I wish to be understood as by no means saying that the proceedings of different bodies, to whom part of the administration of the public business of the country is committed, could not be matter for general discussion and publication."

In the same case Lord Justice Mellish says: "I do not mean to say that the matter was not of such public interest as that comments would not be privileged if the facts had been ascertained." And Lord Justice Bramwell says: "If this had been a discussion on the plaintiff's conduct, the facts not being in controversy, the matter was a subject of such general public interest as would have given a right to comment upon it, and fair and *bona fide* comments would have been justified." This case, to our mind, goes far to show that proceedings such as these, where the facts are ascertained and finally adjudicated upon, are privileged. *Cox v. Feeney* (*h*), decided in 1863, was a *nisi prius* decision, and Lord Chief Justice Cockburn spoke with approval of the *dictum* of Lord Chief Justice Tenterden—namely, that "a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know"; and told the jury that the publication of a matter of a public nature, and of public interest, and for public information, was privileged, provided it was published with the honest desire to afford the public information, and with no sinister motive. The present case is stronger. The report is a report of proceedings which actually took place, proceedings within the jurisdiction

of the Council, a report of proceedings where the facts had been ascertained, a *bona fide* true report without any sinister motive, a report of a matter of a public nature, a report of proceedings in which the public are interested, and in respect to which they are entitled to information.

New and important bodies were from time to time constituted by the Legislature, such, for instance, as the London County Council and other County Councils throughout the country, bodies to whom the most important duties are entrusted, duties in which the community at large are interested. Is it to be said that *bona fide*, honest, and accurate report of the proceedings of these bodies is not privileged, because in the course of the proceedings the character or conduct of individuals is impugned? Such a result would be most mischievous; it would impede the free action of these bodies and deprive the public of information to which, in our opinion, they are entitled. If the report had simply been a report of the fact that the plaintiff's name had been erased, we cannot think it would have been contended that the report was not privileged. It is said, because the nature of the offence is stated, the privilege is lost. In our opinion the Council were fully justified in stating the cause of the erasure. If it had not been stated, the plaintiff might have complained that the public were left to infer that he had been convicted of felony or misdemeanour under the earlier part of section 29. It might have been said it was unfair to publish part of the proceedings only. Again, if they have published too much, this would not destroy the privilege; it might be evidence of express malice—but it is admitted there was no such malice. It is also said that the privilege is lost because there has been a publication to the public at large, to a class beyond those interested in the matter; but this I have disposed of, because, in our opinion, the public at large were interested in these proceedings, and their publication was information to which the public were entitled. There is an American decision—*Barrows v. Bell* (*k*), very similar to the present case, where it was held that the publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction was privileged. The decision is instructive, and is entirely in accordance with the views we have expressed. In *Whiteley v. Adams* (*n*), Chief Justice Erle said: “Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in defining what kind of social or moral duty or

“what amount of interest will afford a justification, but all are clear that it is a question for the judge to decide.” This action is in truth an attempt to have the decision of the Council reviewed by another tribunal. We express no opinion on that decision. It cannot be reviewed directly, and this attempt to review it indirectly cannot succeed. We have come to the conclusion that the publication of these proceedings, being true, accurate, and *bona fide*, is privileged, and that the learned judge was right in holding that there was no question which he ought to leave to the jury, and in giving judgment for the defendants the appeal must be dismissed with costs.

Appeal dismissed.

LEESON v. GENERAL MEDICAL COUNCIL

1889. Dec. 21.

[59 L. J. (Ch.) 233]

Reported also :

43 Ch. D. 366 ; 61 L. T. 849 ; 38 W. R. 303.

See also Minutes of General Medical Council :

Vol. XXVI. (1889) 153, 154, 155, 160, 161.

Vol. XXVII. (1890) 67, 166, 167, 206 to 209.

Vol. XXVIII. (1891) 138, 140, 210.

Medical Practitioner—Removal from Register—Judicial Inquiry—Domestic Forum—General Medical Council—Medical Act 1858 (21 & 22 Vict. c. 90), s. 29—Jurisdiction of Court—Personal interest of member of Forum.

The General Medical Council held an inquiry upon a complaint made by the Medical Defence Union against the plaintiff, a registered medical practitioner, that he had been “guilty of infamous conduct “in a professional respect” in that he had acted as “cover of” or by his advice and assistance had enabled one H. to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified under the style of ——. On the inquiry the charge was read by the solicitor to the General Medical Council, and the solicitor to the Medical Defence Union then stated the facts alleged against the plaintiff, who was present with his solicitor, and was heard in reply. The General Medical Council found that the plaintiff had committed the offence charged against him, that the offence was “infamous conduct in a professional respect,” and directed the Registrar to erase the plaintiff’s name from the Medical Register. Two of the members of the General Medical Council

were subscribers to and guarantors of the Medical Defence Union, an association having for its objects the protection of members, the prevention of unprofessional conduct, and the punishment of offenders, but were not members of the council of that union, by whom the charge against the plaintiff was made, and who had full power under the articles of the association to act. The plaintiff brought this action against the defendants for an injunction to restrain them from removing his name from the register :—Held, that the offence charged against the plaintiff was within the jurisdiction conferred on the General Medical Council by the Medical Practitioners Act, 1858, and that as the Council had acted honestly within its jurisdiction, the Court had no power to interfere with its decision.

Held, by COTTON, L.J., and BOWEN, L.J. (FRY, L.J., dissentiente), that the fact that two members of the General Medical Council were subscribers to the Medical Defence Union, by whom the charge was made against the plaintiff, did not invalidate the decision of the General Medical Council, as they were not actually or constructively accusers or quasi-accusers of the plaintiff.

Decision of NORTH, J., affirmed.

The Queen v. Allen (4 B. & S. 915 ; 33 L. J. (M. C.) 98) considered.

This was an appeal by the plaintiff, a licentiate of the Royal College of Physicians of London, and a licentiate of the Royal College of Surgeons of Edinburgh, and a registered medical practitioner, from a refusal, of NORTH J., to grant an injunction restraining the defendants from removing his name from their Register of General Practitioners until the trial of the action, and from publishing certain resolutions passed by them on the 28th of November 1889, to the effect that the plaintiff had been guilty of infamous conduct in a professional respect.

On the 15th of November 1889, the solicitor of the General Medical Council wrote and sent to the plaintiff [a notice of inquiry into the following charge, viz :—]

“ That you, being a registered practitioner, do act as cover of
 “ or by your present advice and assistance do enable one Cornelius
 “ Bennett Harness (an unqualified person) to carry on the business
 “ or profession of a medical electrician, and to practise as if he were
 “ duly qualified, under the style of the Medical Battery Company,
 “ Limited, and the Electropathic and Zander Institute, at 52
 “ Oxford Street, London, W., the said Cornelius Bennett Harness
 “ publicly advertising himself as the Medical Battery Company’s
 “ consulting medical electrician.”

The charge against the plaintiff was made in the name of the Medical Defence Union, an incorporated company, limited by

guarantee under the Companies Act, 1862. The objects of the union were, *inter alia*, (a) to support and protect the character of medical practitioners practising in the United Kingdom; (b) to promote honourable practice, and to suppress and prosecute unauthorised practitioners; (c) to advise, defend, or assist in defending the members of the union in cases where proceedings involving questions of professional principle or otherwise were brought against them. Article 36 of the articles of association provided that the management of the business and the control of the union was vested in a council, which was thereby authorised to exercise all such powers and do all such acts as might be exercised or done by the union, and which were not by the articles or statute expressly directed to be exercised or done by the union in general meeting. Article 2 limited the power of the council by providing that the objects of the union, so far as they related to the suppression or prosecution of unauthorised practitioners, should not be acted on without the sanction of a unanimous resolution of the council confirmed by a majority of the members of the union present and voting in general meeting.

The inquiry into the charge against the plaintiff was held by the General Medical Council. The solicitor of the Council opened the proceedings by reading the charge against the plaintiff, and written statements in support of the charge were then submitted to the General Medical Council by the solicitor for the Medical Defence Union. The plaintiff was present at the inquiry, attended by his solicitor, who submitted statements to show that the plaintiff had done nothing which was infamous in a professional respect. After the members of the General Medical Council who had conducted the inquiry had deliberated, the president informed the plaintiff that the Council had come to the following resolutions:—“(1) That you have committed the offence charged against you. (2) That the offence is, in the opinion of the Council, infamous conduct in a professional respect. (3) That the Registrar has been directed to erase your name from the medical register.”

The resolutions of the General Medical Council as subsequently printed set forth the charge against the plaintiff in the exact words contained in the letter of the Council's solicitor.

Of the members of the General Medical Council who took part in the inquiry, two—namely, Dr. Glover and Mr. Teale—were also members of the Medical Defence Union, being subscribers of 10s. a year and guarantors; but neither Dr. Glover nor Mr. Teale was a member of the council of the Medical Defence Union.

The General Medical Council had no power to make, and did not make, the plaintiff pay the costs of the inquiry.

Immediately after the conclusion of the inquiry the plaintiff brought this action against the General Medical Council, claiming an injunction as above stated. NORTH, J., held that the charge against the plaintiff was really that he had acted as "cover" of Mr. Harness, not merely to enable him to carry on the business of a medical electrician, but to practise as if he were a duly qualified medical practitioner, and that was a matter within the statutory jurisdiction of the General Medical Council; and that as they had acted regularly and *bona fide* in their proceedings, the Court had no power to interfere. He also held that the two members of the General Medical Council who were also members of the Medical Defence Union were not thereby incapacitated from taking part in the inquiry, and that the decision was not invalidated on this ground, and he refused to grant the injunction claimed.

From this decision the plaintiff appealed.

Rigby, Q.C., Cozens Hardy, Q.C., and George Henderson, for the appellant.—We admit that by section 29 of the Medical Act, 1858, a jurisdiction is conferred on the General Medical Council which is not subject to any appeal to the Court, provided that the case dealt with by them is within their proper seizin, and they have acted honestly within their jurisdiction. But if the Council act in a matter not within their jurisdiction, or do not conduct the proceedings properly and *bona fide*, then the Court will interfere by *mandamus* or injunction (*Ex parte La Mert* [*ante*, page 81] and *Allbutt v. The General Medical Council* [*ante*, page 117]). Here the charge against the plaintiff is that he enabled Harness, an unqualified person, to carry on the business of a medical electrician as if he were duly qualified, under the style of the Medical Battery Company. That must mean as if he was a duly qualified medical electrician. For a duly qualified medical practitioner to act as "cover" for an unqualified medical practitioner, and to enable him to act as if he was a duly qualified practitioner, is an offence within the 29th section. But that is not what is charged here. The charge is that the plaintiff enabled Harness to act as a duly qualified medical electrician—which he is; and there is no evidence that Harness ever claimed or professed to be a duly qualified medical practitioner. The charge, therefore, is not one within the jurisdiction of the General Medical Council under section 29, and the plaintiff is entitled to the injunction he asks. Our next point is that two members of the General Medical Council who heard the charge against the plaintiff, and joined in the decision complained of, were members of the Medical Defence Union, who acted as prosecutors in the charge. The principle is well established that a person cannot act

as prosecutor and judge in the same matter ; neither can a person act as judge who has a pecuniary interest in the matter in question (*The Queen v. Allen* (a), *Dimes v. The Proprietors of the Grand Junction Company* (b), *The Mercers' Company of Chester v. Bowker* (c), *The Queen v. Gibbon* (d), *The Queen v. Milledge* (e), and *The Queen v. Farrant* (f).) The order is therefore invalid, as two of the persons who acted as judges were also in the position of prosecutors.

Everitt, Q.C., and *Muir Mackenzie*, for the respondent, were only called upon on the second point.—All the cases referred to on behalf of the appellant were cases where magistrates were exercising quasi-criminal jurisdiction in a judicial capacity. In the present case the proceeding before the General Medical Council was not a judicial or a quasi-judicial proceeding. The Medical Defence Union did to some extent act as prosecutors, but it was not necessary that the charge or complaint should be made by any one to the General Medical Council, who might, *mero motu*, have set the proceedings in motion. It would have been *intra vires* for the General Medical Council to have started the proceedings, and their decision could not have then been impeached. And the decision of the General Medical Council cannot now be impeached because two of the members happen to have been subscribing members of the Medical Defence Union who presented the charge against the plaintiff. These two gentlemen, although subscribers to and guarantors of the Medical Defence Union, were not members of the governing body or council who instituted the proceedings, and had no control over the action of that body, and they had no pecuniary interest in the matter. In *The Queen v. Allen* (a) one at least of the magistrates was a member of the committee which instituted the proceedings ; the proceedings were of a criminal nature, and they were instituted, not by a corporate body as here, but by an incorporate body.

They cited *The Queen v. Handsley* (g), *The Queen v. Farrant* (f), *The Queen v. Rochester Dean and Chapter* (h), *The Queen v. Rand* (i), *The Queen v. Meyer* (k), *The Queen v. The General Medical Council* (l), and *The Queen v. Pettitmangin* (m).

(a) 4 B. & S. 915 ; 33 L. J. (M. C.) 98.

(b) 3 H. L. Cas. 759 ; 19 L. J. (Ch.) 345.

(c) 1 Str. 639.

(d) L. R. 16 Q. B. D. 168.

(e) 48 L. J. (M. C.) 139 ; L. R. 4 Q. B. D. 332.

(f) 57 L. J. (M. C.) 17 ; L. R. 20 Q. B. D. 58.

(g) 51 L. J. (M. C.) 137 ; L. R. 8 Q. B. D. 383.

(h) 17 Q. B. Rep. 1 ; 20 L. J. (Q. B.) 467.

(i) 35 L. J. (M. C.) 157 ; L. R. 1 Q. B. 230.

(k) L. R. 1 Q. B. D. 173.

(l) [*Ante*, page 38.]

(m) 9 L. T. (N.S.) 683.

Sebastian, for the Medical Battery Company.
Rigby, Q.C., replied.

Cur. adv. vult.

COTTON, L.J.—This is a motion, by way of appeal from Mr. Justice NORTH, to restrain the defendants, who are the General Medical Council, from acting on the resolution at which they arrived, which was that the name of the plaintiff be struck off the Register of medical practitioners, and to prevent them from publishing that resolution.

The General Medical Council is a body which is formed under 21 & 22 Vict. c. 90, which Act was passed for the purpose of enabling persons requiring medical aid to distinguish qualified from unqualified practitioners. It is a body partly composed of medical men who are named by certain public bodies, partly of persons elected by the general body of qualified medical men in the country, and partly of persons named by the Queen.

The Act required, and for the first time required, that there should be a Register; and those only who are entered on the Register can sue for and obtain payment of any money payable to them for medical attendance or medical fees; and then powers were given to this body by various sections, of which section 29 was the first and the most important one. [*His Lordship read it, and continued:*] And that was what was done in this case by the General Medical Council. There was another clause, clause 40, which I ought to refer to, because it was a good deal referred to in argument. It enabled criminal prosecutions to be taken against persons who falsely pretended to be registered practitioners, but the proceeding taken in this case was not under the powers of that last section, because Dr. Leeson was on the Register at the time when this order was made by the General Medical Council, and was properly on the Register.

Now, there have been a good many points argued here; and the first was that the matter in respect of which the General Medical Council here adjudicated or decided was not a matter within the powers given to them under section 29, and for that purpose the charge made against the plaintiff, and which was brought to his notice by writing according to the practice of the General Medical Council, was referred to, and it was as follows:—"You, being a registered medical practitioner, do act as cover of, or by your presence, advice, and assistance, do enable one Cornelius Bennett Harness, an unqualified person, to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified, under the style of 'the Medical Battery Company (Limited),' &c. I need not read

more. It was said that there was nothing contained in this complaint which would justify the General Medical Council in exercising the powers given to them by section 29, and there was a good deal of verbal criticism ably pressed upon us as to the effect of what was said in the notice. It was said that there is no allegation that Mr. Harness is practising as if he were a duly qualified medical man. It only says, "as if he were duly qualified, under the style of the Medical Battery Company," and that all that Dr. Leeson was supposed to have done was that he assisted him to represent himself as a medical electrician. I cannot read it in that way. We know what a duly qualified medical man is in the Act. A person is duly qualified if he is on the Register, and in that respect duly qualified to obtain the benefit of the Act as regards the privileges which are conceded to those medical men who are on the Register, and I have no doubt that this notice does state that which would justify the General Medical Council, if they were satisfied that it was supported by the facts, in coming to the conclusion that an offence had been committed which was, in the words of the Act, "infamous conduct in any professional respect." That, in my opinion, is the true construction of the words of the charge which is made against the plaintiff. And it was found that he had been guilty of the acts charged against him, and there was a direction to erase his name from the Register.

There has been here a good deal of question as to what took place on the inquiry, and we have had the evidence which was before the General Medical Council brought before us. In my opinion, it would be wrong to consider whether the General Medical Council arrived at a right conclusion on the evidence which was brought before them. The General Medical Council cannot, strictly speaking, take evidence. They cannot take evidence on oath. They cannot take evidence which we, as lawyers, have to consider as evidence. They have statements made before them in support of any complaint which is made, and also they have statements made on the other side by the medical man against whom the complaint is made; and if it is once established that the complaint made before them does involve a matter in respect of which they can exercise the jurisdiction given to them by section 29, then I think we ought not to look at the evidence or in any way consider whether they have arrived at a right conclusion. Of course, if it was alleged and proved before us that they had acted corruptly—if it was proved that there was no statement made before them on which they could reasonably and honestly arrive at the conclusion at which they did arrive, then I think we ought to consider it to see whether

the fact that there was no statement which could justify the conclusion, was such evidence as, if not displaced, would lead us to the conclusion that the Council had not acted honestly with respect to the charge brought before them, but had acted with some other indirect object. But although there were some allegations in the affidavit of the plaintiff in this case that there was prejudice against him, that was not pressed upon us at all by counsel, nor was it any way supported by anything which was brought before us. Dr. Leeson seems to have had a most perfect consideration of his case. The complaint was brought forward in the ordinary mode required by the rules and regulations of the General Medical Council. He was there; he was represented by his solicitor, and he brought his own witnesses—that is to say, those who with him were to make statements in support of his contention that in his conduct he had done nothing which was infamous in a professional respect; and everything was heard, most fully heard and considered, and then the Council arrived at the conclusion at which they did arrive. In my opinion, that being so, we cannot consider as to whether they are right or wrong. That must be left to them.

In my opinion, therefore, the first ground which was taken in support of this application fails, because I think there was a charge which justified the General Medical Council in making the inquiry under section 29, and there was no reason for suggesting that the proceedings were improperly conducted by them.

But then there was another point raised, which occasioned rather more doubt, and which was this. It was suggested as a second point, that this order made by the General Medical Council must be considered as made by a non-competent tribunal; for it was said that, taking the Council as acting judicially, it was so constituted on this particular occasion that any order made by it ought, having regard to the decided cases, to be considered as a nullity. Now, it appears that the complaint against Dr. Leeson—I will not call it indictment—was brought in the name of the Medical Defence Union, and it turns out when attention is called to the matter that two of the members of the Council who were present when the case of Dr. Leeson was considered were members of the Medical Defence Union; and it was said that they are to be considered in the light of prosecutors, and that as they were prosecutors they could not also sit as judges of the matter. It was therefore contended that any decision which the Council arrived at when these two members, who were incompetent to act as judges in the matter, were present, must be considered as a nullity.

Of course, the rule is very plain that no man can be plaintiff

or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings forward the accusation or complaint on which the order is made. To my mind it is clear here that the General Medical Council, in respect of the complaint against Dr. Leeson, were acting judicially. They were not in the ordinary sense judges, but they had to decide judicially as to whether or not the complaint against Dr. Leeson was well founded; and they could, if they found it was well founded, make an order which would be of great importance to him, and deprive him of being on the Register, with very serious consequences. But then we have to consider this. Were either of these two gentlemen, Mr. Teale and Dr. Glover, to be considered as complainants in this case?

In considering this, we must look a little at the Medical Defence Union. The Medical Defence Union was a company limited by guarantee under the Act of 1862, and one of the objects was "to support and protect the character and interests of medical practitioners practising in the United Kingdom," and then "to promote honorable practice, and to suppress or prosecute unauthorized practitioners." Then they are "to advise and defend, or assist in defending, members of the Union in cases where proceedings involving questions of professional principle or otherwise are brought against them." So that it was not only to prosecute those who offended against the Act, but to defend those against whom charges were brought unreasonably. Then, if we look at the articles we find this—that there was a Council, and the Council practically had all the powers of the company which formed the Union except in one respect, they could not institute prosecutions against any one who was acting in violation of the law without the vote of a general meeting. One of the articles is as follows: "The objects for which the Union is established shall be carried out in the manner provided by these articles, provided that the second of the objects of the Union as there set forth, so far as relates to the suppression or prosecution of unauthorized practitioners, shall not in any case be acted on without the sanction of a unanimous resolution of the Council, confirmed by a majority of members present and voting at a general meeting." But we are not now considering a prosecution under the Act, and except in that respect there is no limit on the power of the Council, who can do everything which is not expressly or by Act of Parliament required to be done by the whole body. Neither Mr. Teale nor Dr. Glover were members of the Council; they were members of the Union by subscribing 10s. a year and by giving a guarantee, the amount of which we do not know,

which was to provide any expense which would be necessary in order to carry out the objects of the Association. The powers of the Council are referred to in article 36. [*His Lordship read it, and continued :*] Now this complaint made against Dr. Leeson was a complaint brought forward by the Council, to which neither of these two members of the General Medical Council belonged. They were not upon it, and they could not, having regard to the articles, exercise any control or give any direction as to what should be done by the Council in bringing forward this complaint. Then are they, as members, in any way interested ? The expenses of this complaint could not be thrown by the General Medical Council on Dr. Leeson, the person complained of. They had no power to give any costs, and therefore, whatever might be the result of this complaint made against him, it would not in any way affect the liability of Mr. Teale and Dr. Glover to contribute anything to the expenses of this proceeding. Then, as regards the question whether they are to be considered as complainants here, we ought to look to substance, and not, because this complaint is brought by the Council in the name of the Union, to say that a person, a member of a union, who has nothing to do and can have nothing to do with bringing forward this complaint, is to be treated as a prosecutor or as one of the persons who is bringing forward this complaint. The term "prosecutor" is sometimes objected to, but I use it for the sake of simplicity. Therefore, it cannot be said that here these two members have been incompetent to act because they were adjudicating upon a complaint brought forward by themselves ; and, as I have already shown, there can be no pecuniary interest and no bias in that respect, either from any pecuniary liability which was thrown upon them, or anything of that kind. Whichever way it was determined, their liability as to contributing to the expenses would be just the same. I may also observe that as regards the objects of the Union—I give no opinion as to whether it is desirable to form such unions—the objects are just as much to defend those who are improperly attacked as to bring before the General Medical Council any question which may reflect on the conduct of any member of the profession ; so that on that ground they are not to be considered as complainants here—as persons who are bringing forward this charge—and there was hardly any contention that their position as members of the Union did actually involve a bias which would prevent them from adjudicating on this case.

Numerous cases were quoted, but, in the view which I take of it, it is only necessary to advert to one which probably is the strongest in favour of the appellant here—*The Queen v. Allen (a)*.

There certain gentlemen, riparian owners and owners of salmon fishing, and some who were outsiders, formed themselves into a body not in any way incorporated, all of whom apparently would have equal power, and there was a committee formed which was a committee to direct prosecutions. Three magistrates were sitting on the bench when a question was brought before them, and they were members of this association which had been formed. One of them was a member of the committee that had directed the prosecution. There was no doubt, therefore, he was a prosecutor in the matter which was brought before the magistrates for decision, and therefore there could be no doubt that, having regard to the principle laid down, the conviction was bad. But the other two had nothing to do with that committee, and were only members of the association; and that was the principal point relied upon here. But Chief Justice Cockburn, no doubt, does use language which would seem to show that, even if only those magistrates who were members of the association and not on the committee had been on the bench, the conviction would have been bad. What he said was this: "Certain members of that association were present as justices, and took part in this conviction. They were essentially prosecutors, being members of an association the aggregate of which were undoubtedly the prosecutors." Well, I myself do not think that the language of judges ought to be taken without reference to the facts of the case; and although he did use that large expression, yet Lord Blackburn, who was on the bench too, and Mr. Justice Mellor did not use language which can be even tortured into saying that if any member of the association had been on the bench at the time, that would have vitiated the proceeding. What Lord Blackburn said was this: "One of the justices who joined in the conviction, being a member of the committee of the association which instituted the proceedings, was one of the prosecutors. There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information, but members of the association which institute the prosecution must not act as judges upon it." There, I think, he puts it that the conviction was bad because one member of the committee who were actually prosecutors was sitting on the bench at the time; and Mr. Justice Mellor's language, I think, fairly interpreted, leads to the same conclusion. But even if Chief Justice Cockburn did intend by the language he used to say that the conviction would have been bad if any one of the members of the association who had nothing to do with the prosecution, and could not have, and who had not been on the committee, that that would have vitiated the conviction, I should not follow him in a case like this, where neither

Mr. Teale nor Dr. Glover had, or could have, any voice at all in this prosecution, and who on the evidence knew nothing at all about it till the matter was brought before them as members of the General Medical Council.

In my opinion this objection, which is a most serious one, cannot prevail, and we ought to hold that Mr. Justice NORTH was right in refusing the injunction.

BOWEN, L.J.—As to the first point raised by the appeal, I shall say very little in addition to what the Lord Justice has already stated. These proceedings were in the nature of judicial proceedings, although the forum is a domestic one, and although the evidence taken before such forum differs in many respects from evidence which is adduced in a Court of law, and in particular in the all-important respect that it is not given upon oath. The only thing which the Courts can investigate when proceedings of the General Medical Council of this character are brought before them is whether the domestic forum has acted honestly within its jurisdiction. The jurisdiction is defined by the statute. There must be an adjudication by the General Medical Council of infamous conduct in some professional respect, and that adjudication must be arrived at after due inquiry. The statute says nothing more, but in saying so much it certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all. We have seen that those conditions have been fulfilled by the inquiry and by the tribunal which institutes it. The functions of the Court of law are at an end. It appears to me that we have no power to review the evidence any more than we have a power to say whether the tribunal came to the right conclusion. If, indeed, it could be shown that nothing was brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to show that the inquiry had not been a due inquiry; but if there is no blot of that kind upon the proceedings, the jurisdiction of the domestic tribunal which has

been clothed by the Legislature with the duty of discipline in respect of a great profession must be left untouched by Courts of law. It appears to me, for these reasons, that the view which Lord Justice Cotton has expressed is the sound one, and I entirely concur with it.

Next comes a very serious question, whether or not the tribunal which adjudicated in respect of the appellant's conduct was, in respect of two of its members, rendered incompetent by the fact that they had taken part as accusers before the Council of the person upon whose conduct they were adjudicating. As the Lord Justice has said, nothing can be clearer than the principle of law, that the person who has a judicial duty to perform disqualifies himself for performing it if he has a pecuniary interest in the decision which he is about to give, or a bias which renders him otherwise than an impartial judge. If he is an accuser, he must not be a judge. If he has a pecuniary interest in the success of the accusation, he must not be a judge. Where such a pecuniary interest exists, the law does not allow any further inquiry as to whether or not the mind was actually biassed by the pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision, and he cannot act as a judge. But it must be in all cases a question of substance and of fact whether one of the judges has in truth also been an accuser. The question which has to be answered by the tribunal which has to decide—the legal tribunal before which the controversy is waged—must be: Has the judge whose impartiality is impugned taken any part whatever in the prosecution, either by himself or by his agents? I think it is to be regretted that these two gentlemen, as soon as they found that the person who was accused was a person against whom a complaint was being alleged by the council of a society to which they subscribed, and to which they in law belonged as members, did not at once retire from the Council. I think it is to be regretted, because judges, like Cæsar's wife, should be above suspicion, and in the minds of strangers the position which they occupied upon the Council was one which required explanation. Whatever may be the result of this litigation, I trust that in future the General Medical Council will think it reasonable advice that those who sit on these inquiries should cease to occupy a position of subscribers to a society which brings them before the Council. But having said that, I come back to the point which we have to decide, whether these two gentlemen took any part whatever in the prosecution, either by themselves or by their agents. It appears to me, in spite of the cloud which the ingenuity of the appellant's counsel raised upon the point, that

the true answer must be here upon the facts—and it is a question of fact—in the negative. I think, although they were members of the corporation whose council did bring this complaint before the General Medical Council, they did not themselves take any part, and could not have taken any part, whatever in the prosecution, and that the prosecution was not conducted really by the Council of the Union as their agents. The Council of the Union was supreme in the matter, and I think that they stand clear, upon the facts being investigated, of all suspicion whatsoever.

For those reasons, treating the latter part of the case as one which depends upon an inference of fact; and regretting, as I do, that there should be colour for the suggestion that has been made, and that a controversy should accordingly have arisen which required to be carefully considered—with the care which we have brought to bear upon it; nevertheless I think that, as a matter of substance and of fact, these gentlemen were not accusers on this particular occasion.

The appeal therefore in my judgment must be dismissed with costs.

FRY, L.J.—Two questions have been argued before us. The first was a question whether the charge which was laid before the General Medical Council was one which was within the jurisdiction of that Council. Now, with all that has been said by my learned brothers on that part of the case I entirely concur—I shall add nothing to what they have so fully and clearly expressed.

Then comes the second question—whether, having regard to the fact that two members of the Council were subscribers to what is known as the Medical Defence Union, the Council as constituted was competent or incompetent to determine the charge. Now, there again, there are two subordinate questions in which I entirely agree with my learned brethren. In the first place, I cannot for one moment yield to the argument which was addressed to us by the leading counsel for the General Medical Council, that they were not acting judicially in the performance of their duties on that occasion. The nature of the proceedings and the effect of the proceedings seem to me to be very strong to show that it must be a judicial proceeding, because the result was to deprive Dr. Leeson of rights which before that were vested in him as a duly qualified medical man on the Register of the Council. Further than that, the language of the statute, if it be necessary to refer to that, is in my judgment equally clear. It requires a due inquiry. It requires a judgment. It requires that that judgment shall find him guilty. Now “inquiry” and “judgment” and “guilt” are all words which express, and which are relevant to, a proper form of judicial proceedings; and there-

fore, although this body proceeds by different rules of evidence to those on which the Courts of law proceed, I cannot for a moment doubt that the Council were proceeding judicially; nor can I help adding that the manner in which the Council has proceeded on this inquiry, as on all other inquiries, shows that the Council are fully aware that they are performing judicial duties, and endeavour evidently to perform them in a very admirable manner.

The second point is this. It was urged before us that the Medical Defence Union were not in fact complainants. It was said that the Council could proceed without any prosecutor, or person acting before it. They might proceed *mero motu*. That is quite true; but it is equally true that in this case they did not proceed *mero motu*, but they proceeded in this manner. They allowed the solicitor and the honorary secretary of the Medical Defence Union to appear before them in the character of complainants—a course which seems to me to have been a very convenient one to pursue; and it is not unworthy of remark that, on the very same meeting of the Council at which these proceedings were taken against Dr. Leeson, rules in respect of the procedure at such inquiries were passed by the Council, which divided themselves into two classes of cases. One of these classes was where the inquiry is brought before the General Medical Council by a complainant, and the complainant appears personally, or by counsel, or by a solicitor, then a certain order of procedure was enacted, and that order of procedure followed very nearly the procedure before a Court. It gave the complainant an opportunity to state his case, then produce his proofs; then the accused was to be invited to state his case, and to produce his proofs; and then there was an opportunity given for a reply in certain cases. The second class of cases was, where no complainant appeared. There the Council proceeded simply by reading the complaint and calling on the accused practitioner to state his case and produce his evidence. It is evident, therefore, the Medical Defence Union, either as a whole or by their executive, were proceeding as complainants, and as *quasi*-prosecutors in this inquiry. No doubt the Medical Defence Union acts through its Council, through its executive body; and this proceeding was taken by the executive body, and they were represented, as I have already stated, by their solicitor and the honorary secretary. They acted in fact as prosecutors, producing the evidence and stating the case, and urging what was to be said for the prosecution or *quasi*-prosecution.

Now to that union two of the members of the General Medical Council which sat upon this case, and who therefore took part in his decision, were subscribers, and it may be taken that this

prosecution—I call it a prosecution for the sake of brevity—this proceeding, was within the objects of the union. It appears to me that subscribing to a union of this description implies two things. It implies a general sympathy with the objects of the union ; and it implies, secondly, a confidence in the discretion of the executive body, who have to carry on the business of that union. No doubt the amount of confidence and the amount of sympathy may vary in different cases and from time to time with the same subscribers ; but that is the natural conclusion, I think, one arrives at when one finds a person subscribing to an association for carrying on prosecutions.

Now that, in my opinion, makes the subscriber to an association of this kind what has been called a virtual prosecutor—of course he is not an actual prosecutor ; he is not before the tribunal *in propria persona* ; he has not even given instructions to the solicitor who appears ; but he has shown his sympathy and his confidence in that body who are acting in this respect, and I cannot think that a body of subscribers to a union of this description could form a satisfactory body of judges to determine the proceedings taken by the union itself. Taking that view of the case, I cannot shut my eyes to the fact, which judges know as well as everybody else, that there are in this country numerous associations formed for the purpose of carrying on prosecutions in respect of alleged violations of the law of various kinds. They may be sometimes in respect of violations, or alleged violations, of rights of fishery in a river, as in the *Tees Case (a)* ; or they may be violations, or alleged violations, of the laws which restrain cruelty towards animals ; or they may be violations, or alleged violations, of the ecclesiastical laws. Now it appears to me that subscribers to those associations indicate their sympathy with the general proceedings of the body in carrying on those prosecutions, and I think they come within the description which has been laid down of virtual prosecutors.

To my mind this point is determined by authority. I do not say authority binding on us, but authority which I think deserves the utmost respect and consideration—I mean the case to which Lord Justice COTTON has referred, of *The Queen v. Allen (a)*. In that case there was a voluntary association of persons which consisted of two classes—ordinary members, who were the owners of river-side property or occupiers of the rights of fishing in the Tees and its tributaries ; secondly, honorary members, who might be desirous of promoting the objects of the association by contributing to its funds, and who were, as I understand, not riparian proprietors or owners of rights of fishing in the Tees. That body acted, as most of these bodies do, through a committee,

and that committee was not only to make bye-laws, and rules and regulations, but they were the persons to engage and dismiss watchers, and in the event of proceedings under the Act being considered necessary, they—that is, the committee—were to instruct the secretary to enforce its provisions ; and the secretary and treasurer were, subject to the approval of the committee, to determine what proceedings should be taken against any person acting in contravention of the law. The ordinary members, therefore, and the honorary members, had nothing whatever to do with instituting the prosecutions or appointing watchers. The person who laid the information in that case was a watcher of the association ; therefore engaged and liable to dismissal not by the general body but by the committee. The magistrates who sat on the bench to hear that complaint were three. Mr. Allen was an ordinary member, and the owner of property having a frontage to the river ; Mr. Smith was not only an ordinary member, but he was an active member of the committee, and had been concerned in a resolution which authorised the committee to take proceedings for the recovery of such penalties as, in their opinion, had been incurred at the defendant's locks ; and lastly, Mr. Rease, who was not an ordinary member, but only a subscribing member of the association. Those were the three justices.

Now, in what way did the Court deal with the application to quash the conviction on the ground of the magistrates being the virtual prosecutors ? The Chief Justice Cockburn said, "It is impossible to hold, consistently with the principles which have been established by decided cases, and are founded upon the very essence of justice, that these magistrates were competent judges upon the occasion in question." Observe, he does not hold that one magistrate is disqualified, but he holds that all three were disqualified according to the essential principles of justice. "An information was laid against the defendant for the violation of the provisions of an Act of Parliament passed for the protection of salmon fisheries." Then he said, "Certain members of that association were present as justices"—again dealing with them all individually—"and took part in this conviction ; they were essentially prosecutors, being members of an association the aggregate of which were undoubtedly the prosecutors." Then Lord Blackburn—Mr. Justice Blackburn as he then was—in my view, notwithstanding what has been said by Lord Justice Cotton, took the same view. He deals, no doubt, in the first place, with the case of Mr. Smith, who was a member of the committee ; but he goes on to add this, "There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information, but members of the association which

“institutes the prosecution must not act as judges upon it.” In other words, he says neither an ordinary nor an honorary member of this association can act as judge upon the matter. Every subscriber to that association appears to me, in the view of these two learned judges, disqualified from sitting as judge or acting as judge on that complaint.

I think, therefore, that is a decision which in point of substance and principle applies to the present case. Of course it is not binding upon us; but in my view that decision is right, and I think it ought to be upheld and applied to the present case. I think it is a matter of public policy, so far as is possible, that judicial proceedings should not only be free from actual bias and prejudice of the judges, but that they should be free from the suspicion of bias or prejudice; and I do not think that subscribers to associations for the purpose of carrying on prosecutions can be said to be free from suspicion of bias or prejudice in the cases of prosecutions instituted by the associations to which they subscribe. It is needless for me to disclaim any intention, in arriving at that conclusion, of holding that the two gentlemen in question were liable to any bias. That appears to me a point which is not really open to us, because I put my decision on the ground of public policy, and I disclaim any right to inquire whether in fact they were or they were not biassed. I need hardly say that I do not believe they were.

Lastly, it was urged that the case I have referred to is not in point, because there the association was not an incorporated one, and in the present case it was incorporated. That, in my judgment, has nothing to do with the case. Corporation or non-corporation is quite immaterial in considering the operation upon the mind of being a member of a union for the purpose of carrying on prosecutions. I think, therefore, that we should be misled by a trivial and immaterial difference if we gave any effect to that. If the matter, therefore, rested with me, I should have held that the decision of the General Medical Council in this case was invalid, and that the Council, as constituted on the occasion in question, was not competent to decide on it, and in so doing, I think that I should best maintain the dignity, and therefore the usefulness, of the General Medical Council. My learned brethren are of the opposite opinion, and therefore this Appeal will be dismissed with costs.

Appeal dismissed with costs.

REGINA v. BAKER

1891. December 3.

[56 J. P. 406.]

Reported also :

8 T. L. R. 123 ; 17 Cox, C. C. 575.

See also Minutes of General Medical Council :

Vol. XXVIII. (1891) 110.

Vol. XXIX. (1892) 19, 158.

Medical Act, 1858—Apothecary pretending to be physician—Using letters M.D.—Penalty—21 & 22 Vict. c. 90, s. 40.

S., a licensed and registered apothecary, used on his door, after his name, the letters "M.D.," also the words "physician and "surgeon," though he was not registered as a physician or surgeon under the Medical Act.

Held, he was rightly convicted under 21 & 22 Vict. c. 90, s. 40, of falsely pretending to be a physician, surgeon, and doctor respectively.

This was a rule *nisi* calling upon Alfred Baker and Edwin Henry Stringer, Esquires, two of Her Majesty's justices of the peace for the county of Warwick, and Charles Clarke, to show cause why a writ of *certiorari* should not issue to remove into the Queen's Bench Division three several records of convictions under the hands and seals of the said two justices, dated on or about the 28th of April 1891, whereby Samuel Edwin Lambert Smith was convicted for unlawfully, wilfully, and falsely using the title of doctor of medicine, of physician, and of surgeon respectively, and why the said convictions should not be quashed when returned on the grounds—(1) that the magistrates had no jurisdiction to convict after the registration of the defendant had been proved ; (2) that the convictions were bad on the face of them, as disclosing no offence under the Medical Act, 1858. The applicant, the said Samuel Edwin Lambert Smith, had been convicted of the three several offences respectively stated by the justices sitting in petty sessions, at Aston, in the county of Warwick, on the 28th of April 1891, each of the three summonses being issued on the information of Charles Clarke, under section 40 of the Medical Act, 1858 (21 & 22 Viet. c. 90).

At the hearing before the justices it appeared that the defendant, Samuel Edwin Lambert Smith, was a registered licentiate of the Society of Apothecaries, and his name appeared in the Medical Register for 1891, as "Lie. Soc. Apoth. Lon., 1885."

He had in course of his practice frequently filled up and signed vaccination certificates, placing the letters "M.D." after his name, and had given the informant, Charles Clarke, at his request, a certificate in duplicate that he, the said Charles Clarke, was too ill to work, and in such certificate Smith signed after his name "M.D.," and had appended a similar signature to a testimonial for the purpose of an advertisement of coca wine. Sometimes also the defendant had added the words "legally registered practitioner" to the letters "M.D." Over the door of the defendant's surgery in large letters were the words "Dr. Smith's branch surgery," and over the window "Dr. Smith, physician and surgeon; surgery hours, morning 10 to 12 a.m., afternoon 3 to 4 p.m. Vaccination daily." On the wall to the right of the windows were the words "Dr. Smith, surgeon." On the wall outside the defendant's house was a brass plate inscribed "S. E. L. Smith, M.D., physician and surgeon, &c." There was also a brass plate on the outer entrance door, inscribed "Dr. Smith, surgeon," &c.; and the same words were printed over a fanlight above the door. On the inner vestibule door was another brass plate, inscribed "Mr. S. E. L. Smith, surgeon, &c."

The defendant, by way of defence, exhibited a document purporting to be a diploma of "The Beach Medical Institute, Indianapolis, U. S. America," and purporting to confer upon the defendant the degree of doctor of medicine.

M. Mackenzie, for the justices, showed cause and contended that there was ample evidence of the offences of which the applicant was convicted, and he produced no evidence of his qualification as either a doctor of medicine, physician, or surgeon. The justices, therefore, acted with jurisdiction, and there was no ground for this rule (*Ellis v. Kelly* [ante, page 21]; *Andrews v. Styrap* [ante, page 87]; *Davies v. Makuna* [ante, page 103]).

Harris, Q.C., and *R. J. Hodgson*, in support, contended that the registration of any one qualification entitled the holder to use the other qualifications, as the test was the entry on the register, and not the particular qualification which entitled a practitioner to be put on that register. Here it was not disputed that the defendant was properly put on the register as an apothecary, and, if so, then he could not be convicted of an offence for using any of the other names also entitling one to be registered. The cases it is true are not quite consistent, but such is the result, and Pollock, C.B., said, in *Ellis v. Kelly* that if a practitioner is once registered he may call himself what he pleases (*a*).

[(*a*) Chief Baron Pollock did not say this. In the course of the argument of counsel for the appellant the Judge interposed the inquiry: "He is registered as a surgeon and apothecary. If qualified and duly registered may he not call himself what he pleases?" See 6 H. & N., at page 225.]

LORD COLERIDGE, C.J.—This is a rule for a writ of *certiorari* to bring up three convictions for the purpose of quashing them. The convictions were made against a gentleman named Smith, who, in a great many instances, had signed documents with his own proper name, and also put up his name on his house and surgery, placing after it the letters “M.D.” and sometimes the words “physician and surgeon,” and “surgeon,” in some cases with the further addition of “legally registered practitioner.” That is what he did, and it is admitted that he claims a right to do so. He is a man who is registered under the Medical Act, 1858, and the question is whether he is a person who comes within the meaning of the 40th section of the Act 21 & 22 Viet. c. 90, on which this conviction proceeded, and which we have now to construe. Now he is registered, and no doubt correctly, under the Act, as a licentiate of the Society of Apothecaries, which would make him, in the common phrase, an apothecary; and being registered as such under the Act, he has not signed or posted up his name as a licentiate of the Apothecaries Company, but as “M.D.” and as “physician and surgeon.” Now he says he is in possession of a degree of “M.D.,” not of any of the universities mentioned in the Act, but of some institute at Indianapolis in America. If he were not claiming to practise and to take privileges under the Act, he would have a perfect right to put “M.D.” after his name, and it would not be necessary for him to add anything to show that it was not a degree conferred by Edinburgh, London, Dublin, or any other place than Indianapolis. But he has put “M.D.” and “physician and surgeon” after his name to give the impression, so it is said, that he is an “M.D.” or a “physician or surgeon” of one of the universities or colleges mentioned in the Act. Those are the facts. A man who is an American “M.D.” and licensed by the Apothecaries Company of England, and registered as such under the Medical Act, 1858, puts after his name “M.D. and physician and surgeon,” and “legally registered practitioner”; the question is, has he broken this Act of Parliament. He clearly is not an M.D. under the Act, although he is an M.D. in America. Now section 40 of the Act says: “Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, surgeon, or any name, title, addition, or description, implying that he is registered under this Act, or that he is registered by law as a physician, or surgeon, shall, on summary conviction,” be liable to a penalty. It is plain that this gentleman has pretended to be a doctor of medicine, because he has put after his name M.D., by which I understand everybody to mean doctor of medicine, and he has stated that he is a practitioner under the Act; therefore,

anybody looking at his signature would assume that, being registered, he was registered as M.D. Now, the argument of Mr. *Harris*, driven to its conclusion, resulted in this—that a man registered under the Act as having one qualification may claim any other qualification mentioned in the 40th section without incurring the penalty. Now, I must say myself, I think that a perfectly monstrous contention. It is obvious that there are different qualifications and examinations for the different heads of medical practice, and that those to which a doctor of medicine must be subject, and upon which he must enter, are quite different from those required for an apothecary, and that calling yourself a physician because you are an apothecary is a fraud upon the public, and the very thing that this Act of Parliament was intended to prevent. It was intended by the Legislature that persons who employ a medical practitioner should know what sort of examination he has passed, and under which of the various heads of medical practice he is to be classed. A person who may be an excellent doctor of medicine may be an absolutely incompetent surgeon. And if he puts surgeon after his name when he was M.D. only he would be misleading people; and that is a thing this Act of Parliament was intended to prevent. In my view of the construction of the Act the magistrates had jurisdiction to convict this gentleman, and we have an authority in the neatest and shortest possible form in the judgment of the present Lord Bramwell, in the case of *Ellis v. Kelly*, decided by a very full Court in the year 1860. The Court was unanimous upon the point, and the sentence of Lord Bramwell upon which I rely is this. He says: “The question depends upon the construction of “section 40 of the Medical Act, 1858. That section is intended to “protect the public from being imposed upon by persons untruly “representing themselves to be legally qualified medical men. It “appears to me that, on the true construction of that section, if “any person wilfully and falsely called himself M.D., he would be “liable to a penalty, though he was in reality a member of the “College of Surgeons or of the Apothecaries Company, and was so “registered.” A more exact and apposite description of the case here, although it was delivered in 1860, I cannot very well conceive. Besides the authority of Bramwell, B., there is my own view of the very clear construction of the statute. I am of opinion that these rules must be discharged.

WRIGHT, J., concurred.

Rule discharged.

ROYAL COLLEGE OF PHYSICIANS
OF LONDON v. GENERAL MEDICAL COUNCIL

1893. *March 8.*

[62 L. J. (Q.B.) 329]

Reported also :

68 L. T. 496 ; 57 J. P. 519 ; 5 R. 323.

See also Minutes of General Medical Council :

Vol. XXVIII. (1891) 160, 161, 211.

Vol. XXIX. (1892) 19, 20, 87, 158.

Vol. XXX. (1893) 16, 43, 44, 209.

Medical Practitioner—Faculty of Physicians—Faculty of Surgeons—Right of College of Physicians to grant independent Diplomas in Medicine and Surgery—Medical Act, 1886, ss. 2, 3 (1) (a).

The Royal College of Physicians of London is, and was at the passing of the Medical Act, 1886, a medical corporation qualified to grant independent diplomas in physie, including therein the practice of medicine, surgery, and midwifery.

Section 3 of 32 Hen. 8, c. 40, contains a direct recognition that in 1540 the science of physie included the knowledge of surgery, and embraced the general art of healing, whether by drugs or surgery.

This was an action tried by SMITH, L.J., without a jury, in which the plaintiffs claimed a declaration that they were at the passing of the Medical Act, 1886, a medical corporation legally qualified to grant diplomas conferring the right of registration under the Medical Acts then in force in respect of medicine and surgery, and that the plaintiffs had always been and then were entitled, independently, and without acting in combination with any other medical corporation or body, to hold such qualifying examinations in medicine, surgery, and midwifery as in the Medical Act, 1886, mentioned, and to confer by their single diplomas on their members and licentiates who had passed such qualifying examination the right of registration under the Medical Acts. By their defence the defendants submitted to the Court whether the plaintiffs were at the passing of the Medical Act, 1886, a medical corporation legally qualified to grant diplomas conferring the right of registration under the Medical Acts then in force in respect of medicine and surgery within the meaning of the Medical Act, 1886.

The following facts were set out and admitted on the

pleadings—namely, examinations in medicine, surgery, and midwifery were, up to the year 1883, conducted by the plaintiffs independently. In the year 1883 it was agreed between the plaintiffs and the Royal College of Surgeons of England that they would hold a joint examination in the case of all candidates who should commence their medical studies on or after the 1st of October 1884. This was carried out, and the agreement is still in force, but is terminable by either party on giving a year's notice. Since 1883 the plaintiffs have continued to hold independent examinations, and have granted diplomas in pursuance thereof to candidates who commenced their studies previously to the 1st of October 1884, and such diplomas have been accepted by the defendants as admitting singly and primarily to the register, and have been so registered both before and since the Medical Act, 1886, and until November 1891. There were still many such candidates, though their numbers had necessarily diminished.

Under the provisions of the Medical Acts, the defendants, in or about the month of April in every year, printed and published the Medical Register as existing on the 1st of January in that year. Each edition of the Medical Register hitherto published had contained therein a table or list, called Table G, purporting to show the several registrable qualifications for the time being.

In the registers published in and subsequently to 1888, Table G was drawn up in a new form, and contained a list of the bodies capable of granting qualifications admitting primarily to the register. Such list included the plaintiffs and the Royal College of Surgeons of England as being jointly capable, but omitted the plaintiffs as being independently capable, of granting such qualifications.

The plaintiffs requested the defendants to alter Table G in their next edition by including the plaintiffs as a body independently capable of granting such qualifications. In consequence of this request the defendants passed the following resolution :
“ That as the claim made by the Royal College of Physicians of London that its single diploma of licentiate or member should admit to the Medical Register without any additional qualification would involve the admission by the Council that the College can itself confer a complete qualification in medicine, surgery, and midwifery, and as this claim is based upon the interpretation of the charter of the College along with the Medical Acts, 1858, 1860, and 1886, the Council leave it to the Royal College of Physicians to substantiate their claim in such way as they may think fit, and in the meantime instruct the registrar not to register the qualifications of licentiate or member of the Royal College of Physicians as in themselves sufficient to admit to the register.”

The plaintiffs complained that if Table G was printed in its present form their reputation would be damaged, it being thence inferred that they were not such a medical corporation as is referred to in section 3, sub-section 1 (a), of the Medical Act, 1886. Their diplomas were from 1858 to the 27th of November 1891 recognised by the defendants. There were 1,169 candidates on the books of the plaintiff corporation who commenced their medical studies before the 1st of October 1884, who had passed various portions of the examinations for the plaintiffs' independent diploma, and who would be entitled to receive that diploma on completing such examinations.

The Solicitor-General (Sir John Rigby, Q.C.), Sir R. E. Webster, Q.C., Sir Arthur Watson, Q.C., and Roscoe, for the plaintiffs, Sir H. Davey, Q.C., and Muir Mackenzie, for the defendants.

Cur. adv. vult.

SMITH, L.J. (on March 8), delivered the following judgment in writing.—The question for determination is whether the defendants, the General Council of Medical Education and Registration of the United Kingdom, are entitled to refuse to place upon the register of medical practitioners the name of a fellow, member, or licentiate of the Royal College of Physicians of London who produces to the defendants' registrar a diploma granted by the plaintiffs to practise physic, including therein the practice of medicine, surgery, and midwifery. The answer to be given to this question depends upon this single point—namely, was the Royal College of Physicians of London, at the date of the passing of the Medical Act, 1886, a medical corporation legally qualified to grant a diploma in respect of medicine and surgery. It is not disputed that the applicant for registration in the present case has been efficiently examined by the plaintiffs in each of these subjects, and that the requisite evidence as to this was forthcoming. The defendants admit that the plaintiff corporation is legally qualified to grant a diploma in respect of medicine, but the position they take up is that it is not a corporation legally qualified to grant a diploma in respect of surgery. By the Medical Act, 1858 (21 & 22 Viet. c. 90), the defendants, the General Council, were created, and it was therein enacted that a register of medical practitioners should be kept. Section 14 prescribed the duty of keeping this register, and section 15 provided for the registration of practitioners. By this section every person thereafter becoming possessed of, amongst others, the qualification of licentiate of the Royal College of Physicians of London became entitled to be registered, on producing to the registrar the document conferring or evidencing the qualification whereof he sought to be registered, which in this case consisted of the diploma of the Royal College

of Physicians of London, issued by them to their licentiate to practise physic, including therein the practice of medicine, surgery, and midwifery. It will be noticed that it is upon the production of the diploma that the applicant is entitled to be registered, and that the Medical Council under this Act could raise no question as to where, when, or in what the applicant had been examined. It is only by sections 20 and 21, if the Council thought that the course of study and examination prescribed by any college or body was not sufficient, that they might intervene, and then could only make a representation thereof to the Privy Council, which might suspend the right of registration if it thought fit. The Medical Council could not refuse to register if the requisite diploma were produced. So matters continued for nearly thirty years, down to the passing of the Medical Act, 1886, when for the first time it was enacted that no person should be registered under the Medical Acts in respect of any qualification unless he had passed a qualifying examination in medicine, surgery, and midwifery, held by, amongst other bodies, a medical corporation legally qualified, at the date of passing of that Act, to grant a diploma in respect of medicine and surgery. Was, then, the Royal College of Physicians of London such a corporation in 1886?—this is the point. By charter granted by Hen. 8, dated the 23rd of September 1518, being the tenth year of his reign, the President and College and Commonalty of the Faculty of Physic in London, better known as the Royal College of Physicians in London, were incorporated to exercise medicine (*medicina*) in the city of London and suburbs, and within seven miles from the city on every side. It was by this charter granted that no one in the city, or for seven miles in circuit of the same, should exercise the faculty of medicine, unless admitted thereto by letters of the president and commonalty, sealed with their common seal. By 14 & 15 Hen. 8, c. 5 (1522–3), this charter was confirmed, and by section 3 it was enacted that no person from thenceforth be suffered to exercise or practise physic through England until such time as he be examined at London by the said president and three of the said elects, and to have from them letters testimonial of their approving and examination. There was an exception made in this Act in favour of graduates of Oxford and Cambridge. Eighteen years afterwards—namely, in 1540—an Act was passed (32 Hen. 8, c. 40) relating to physicians and their privilege. Section 3 is most important, and I set it out at length. “And, “ forasmuch as the science of physick doth comprehend, include, “ and contain the knowledge of surgery, as a special member and “ part of the same ; therefore be it enacted that any of the said “ company or fellowship of physicians, being able, chosen, and “ admitted by the said president and fellowship of physicians,

“ may from time to time, as well within the city of London as else-
 “ where within this realm, practise and exercise the said science of
 “ physick in all and every his members and parts, any Aet, statute,
 “ or provision made to the contrary notwithstanding.” Here it
 will be seen is a direct recognition by statute that the science of
 physick comprehended, included, and contained the knowledge
 of surgery as a special member and part thereof, and that the
 statute granted to the company or fellowship of physicians the
 privilege of practising such science of physick within the realm,
 notwithstanding any Aet, statute, or provision to the contrary.
 In my judgment the statute shows the word “*medicina*,” which
 in English is equivalent to the word “physick,” at that time, at
 any rate, embraced the general art of healing whether by drugs or
 surgery, and was not confined to the healing by drugs, as was
 argued on behalf of the defendants. It appears that from the
 earliest time down to recent date the diploma granted by the
 plaintiffs and their predecessors to their fellows and licentiates
 was, as far as material, in the following form : “*Ego, A. B.,*
 “ *Præsides (vel pro-præsides) hujus Collegii admitto te ad medicinæ*
 “ *facultatem tam docendam quam exercendam.*” It is not denied
 by the defendants that the fellows and licentiates who obtained
 these diplomas have been accustomed to practise as general
 practitioners in medicine, surgery, and midwifery, or in either,
 as to them it seemed best. Sir *Horace Davey*, for the defendants,
 commenced with the charter of 1 Edw. 4 granted to the barbers,
 and traced down the history of the surgeons from this through
 3 Hen. 8, c. 11 (1511), an Aet purporting to relate to the appoint-
 ment and examination of persons to act as physicians and surgeons
 within the city of London and seven miles round (though when the
 Parliament Roll was examined it was found that, as the Aet
 originally stood upon the roll, it applied solely to physicians, and
 that the word “surgeon,” for some reason or another, had since
 been interpolated) ; through 32 Hen. 8, c. 42, uniting the barbers
 and surgeons into one whole body corporate ; through the charter
 of 5 Car. 1 granted to the surgeons ; and through 18 Geo. 2, c. 15,
 whereby the surgeons became incorporated, and of which incor-
 poration the Royal College of Surgeons is the direct successor ;
 and through other Acts prior and subsequent thereto. He argued
 that from these documents, taken together with those cited by
 the plaintiffs, it appeared that there was the faculty of medicine,
 as distinguished from the faculty of surgery, and he urged, and
 with force, that these two faculties from the earliest times had
 run upon totally different lines, and he urged that physicians had
 nothing to do with surgeons. He pointed out, what I think
 was the fact, that although the College of Physicians from the
 year 1582 held lectures in surgery called Lumleian Lectures,

that although their examinations prior to 1835 were “*In primis comitiis in parte medicina Physiologica, in secundis in parte Pathologica, in tertiis in parte Therapeutica,*” which Dr. Liveing said was as much in surgery as medicine, and since that date embraced the obstetric art and principles of surgery, yet it was not till the year 1862 that the first real effective examination in surgery itself was made by the plaintiffs, who then called to their assistance Mr. Erichsen to examine, and since then they have ever had an eminent surgeon to aid them in the examination in surgery of those of their students whom they examined themselves. I should mention that since 1884 the plaintiffs, in conjunction with the Royal College of Surgeons, have held joint examinations of those students who had commenced their studies since that date, and these examinations still continue. Sir *H. Davey* argued that the construction placed by the *Solicitor-General* upon section 3 of 32 Hen. 8, c. 40 was erroneous. I incline to the opinion that Sir *H. Davey* placed the correct construction upon this section when he insisted that the privileges granted by it were confined to the “company or fellowship of physicians,” which he read as equivalent to “commonalty or fellows” of that body; but, be this as it may, it does not affect the point as to whether the plaintiffs could grant a diploma in medicine and surgery. I think, too, that he was correct when he said that surgeons and physicians had run in distinct lines from the earliest time; but this is not what I have to decide. The point is, were the plaintiffs a medical corporation in 1886 legally qualified to grant a diploma in respect of medicine and surgery? The *Solicitor-General’s* reply to the arguments of Sir *H. Davey* appears to me conclusive. He said, for the purpose of this case I accept Sir *H. Davey’s* reading of the section, for he admits that the plaintiffs could grant a diploma to their commonalty or fellows to practise in medicine and surgery, and, said the *Solicitor-General*, that is all that is required, for this brings the plaintiffs within the exact terms of the Act—namely, a medical corporation legally qualified to grant diplomas in respect of medicine and surgery. He said, whether physicians and surgeons ran in different grooves did not affect the point to be determined. In my judgment the *Solicitor-General* is right when he says, once get the corporation legally qualified to grant the diploma, and then they are the persons who are designated by the statute to hold the examination. This argument appears to me to be unanswerable. It has been established that the plaintiffs were at the date of the passing of the Act of 1886 a corporation legally qualified to grant diplomas in respect of medicine and surgery, and that, in my judgment, concludes the case. For these reasons, in my

opinion, the plaintiffs are right, and are entitled to judgment and the declaration asked for, and they must have the costs of this action.

Judgment for plaintiffs.

ALLINSON v. GENERAL MEDICAL COUNCIL

1894. February 23.

[63 L. J. (Q.B.) 534]

Reported also :

[1894] 1 Q.B. 750 ; 70 L. T. 471 ; 58 J. P. 542 ; 42 W.R. 289.

See also Minutes of General Medical Council :

Vol. XXVI. (1889) 211 to 218.

Vol. XXIX. (1892) 75, 79 to 81, 154.

Vol. XXX. (1893) 256.

Vol. XXXI. (1894) 189.

Vol. XXXII. (1895) 103.

Vol. XXXVI. (1899) 64.

Vol. XLI. (1904) 165.

Medical Practitioner—Removal from Register—Judicial Inquiry—General Medical Council—Personal interest of member of Forum—Bias—Infamous conduct in a professional respect—Evidence—Medical Practitioners Act, 1858 (21 & 22 Vict. c. 90), s. 29.

The incapacity of a person, whose impartiality is (apart from pecuniary interest) impugned on the ground of bias, to take part in a judicial inquiry is a question of substance and of fact. Apart from pecuniary interest, his position need not be such that he cannot be suspected, for there is no case where a man cannot be suspected of bias by those who are wilfully perverse ; but he must bear such a relation to the subject matter of adjudication that he cannot be reasonably suspected.

If a medical man in the pursuit of his profession has done something with regard to it which will be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council, if that be shown, to say that he has been guilty of infamous conduct in a professional respect.

The Queen v. Allen (4 B. & S. 915 ; 33 L. J. (M. C.) 98) and Leeson v. The General Medical Council [ante, page 125], discussed.

This was the plaintiff's appeal from a judgment of COLLINS, J., in favour of the defendants to the action, which had been tried before him without a jury.

The plaintiff was a duly qualified physician and surgeon, and a licentiate of the Royal College of Physicians of Edinburgh, and a licentiate of the Royal College of Surgeons of Edinburgh.

The Medical Defence Union was an association registered under the Companies Act, 1862, formed by a body of medical men for the defence of the honour of the profession. In consequence of certain representations made by the Medical Defence Union to the defendant General Council, the plaintiff, on the 14th of May 1892, received from the defendants a notice to appear before them and answer a charge of "having been guilty of infamous conduct in a professional respect," the particulars of which alleged conduct were as follows: "That being a registered medical practitioner and a licentiate of the Royal Colleges of Physicians and Surgeons of Edinburgh you systematically seek to attract practice by a system of extensive public advertisements containing your name, address, and qualifications, and invitations to persons in need of medical aid to consult you professionally; the advertisements so systematically published by you being themselves of a character discreditable to a professional medical man."

Dr. Philipson, a subscriber to and one of the guarantors of the Medical Defence Union, was on the 3rd of May elected a member of the defendant council. He had previously been elected a vice-president of the union, and by reason of being a vice-president was *ex officio* a member of the committee which had instituted the inquiry into the plaintiff's conduct. But immediately upon being elected a member of the defendant council, Dr. Philipson resigned his membership of the Medical Defence Union, although being a vice-president, his notice of resignation did not, according to the regulations of the union, come into effect for two months from its date. There was no evidence that, although an *ex officio* member, he ever actually acted upon the committee which instituted the inquiry.

On the 28th of May, Dr. Philipson attended the inquiry held by the defendant council into the plaintiff's conduct in pursuance of their notice of the 14th of May, when evidence in support of the charge was laid before them by the Medical Defence Union. In the result the allegations were held to be proved, and the plaintiff's name was erased from the register. The plaintiff then brought an action against the defendant council, in which he claimed—first, damages, £1,000; secondly, a declaration that the decision of the defendant council directing the erasure of his name from the Medical Register was void and

invalid; thirdly, an injunction to restrain the defendants from striking out or allowing to remain struck out the plaintiff's name from such register, or from publishing or allowing to be published such decision; fourthly, or for a mandamus to compel the defendants to restore the plaintiff's name to the register if they had already erased the same. Two questions arose at the trial before COLLINS, J., which were shortly as follows:—first, whether Dr. Philipson, being a member of the Medical Defence Union was, upon the ground of bias, disqualified from attending the inquiry at the meeting of the defendant council on the 28th of May, and the decision then arrived at consequently rendered void; secondly, whether there was evidence that the plaintiff had defamed other members of his profession, and had by the circulation of advertisements and leaflets induced patients to leave his brother practitioners and go to him, which justified the defendant council in finding him guilty of infamous conduct in a professional respect.

COLLINS, J., gave judgment for the defendants.

The plaintiff appealed.

Coleridge, Q.C., and *H. S. Schultess Young* for the appellant.—It is a well established principle that no one can act as prosecutor and judge in the same matter. Here Dr. Philipson, a member of the General Medical Council, heard the charge against the plaintiff and joined in the decision complained of, being at the time not only a member of the Medical Defence Union, but also a member *ex officio* of the very committee who acted as prosecutors, for his resignation did not take effect till the expiration of two months from the date it was tendered. This fact in itself carries the case a step farther than *Leeson v. The General Medical Council* [*ante*, page 125], for there the two members of the General Medical Council were merely subscribers to the Medical Defence Union. It was held there by Cotton, L.J., and Bowen, L.J. (Fry, L.J., *dissentiente*) that the mere fact of those members being such subscribers did not invalidate the decision of the Council, as they were not actually or constructively accusers or *quasi*-accusers of the plaintiff. It is submitted, however, that in the present case this is otherwise, and that Dr. Philipson was clearly an accuser or *quasi*-accuser. In *Leeson's Case* the judgment of Fry, L.J., who dissented, is very much in point [*ante*, at page 140]. The learned Lord Justice then proceeds to state his approval of *The Queen v. Allen* (a) a decision of Cockburn, C.J., Blackburn, J., and Mellor, J., and a strong authority in favour of the present contention.

(LOPES, L.J.—This question of bias must in all cases be one of substance and of fact.)

All the authorities go upon the broad principle that justice should be thought to be done as well as really done. *The Queen v. Meyer and others* (b), *The Queen v. Gaisford* (c), *The Queen v. Fraser and others* (d), and *The Queen v. Henley and others* (e).

(LOPES, L.J., called attention to *The Queen v. Farrant* (f).)

As to the merits, the two charges made against the plaintiff were that he advertised for practice and promulgated certain views on the subject of vaccination. This may be improper and perhaps disgraceful, but it is not infamous conduct. There is a distinction between infamous and merely disgraceful conduct, *Partridge v. The General Medical Council* (g). The plaintiff is in a sense a fanatic—he personally abstains from meat, alcohol and drugs. His view is that air, water, and healthy habits are of more value than anything else, and he desires to spread this view.

(LORD ESHER, M.R.—His advertisements and leaflets mean this:—"Don't go to any other doctor, but come to me. I am 'the real doctor.'" Then on the subject of vaccination his pamphlet published in 1887 or 1888, "How to avoid Vaccination," is practically giving advice to violate the law. He promised not to continue to publish the pamphlet, and he has not republished it; but it has become the property of an anti-vaccination society, and he has admitted that he has advised people on the question of vaccination in the precise terms laid down in the pamphlet.)

It is submitted that infamous conduct must be such, *per se*, in a professional matter, and at the utmost the plaintiff's conduct has not approached anything of the sort.

R. T. Reid, Q.C., and *Muir Mackenzie*, for the respondents.—There is a distinction to be drawn between cases in which bias may exist on account of pecuniary interest as such and *Lceson's Case*. No rule has yet been laid down that a person who might be liable to be biassed was therefore biassed. It must be a question of fact, Was such a person likely to be biassed or not?

(DAVEY, L.J.—The proper principle seems to have been laid down by Mellor, J., in *The Queen v. Allen* (a).)

As to the evidence of infamous conduct, the question is what infamous conduct in a professional respect means. It is submitted that something may be professional infamy in a medical man which would not be infamy in a person outside the profession.

(b) L. R. 1 Q. B. D. 173.

(c) 61 L. J. (M. C.) 50; L. R. (1892) 1 Q. B. 381.

(d) 9 T. L. R. 613.

(e) 61 L. J. (M. C.) 135.

(f) 57 L. J. (M. C.) 17; L. R. 20 Q. B. D. 58. (g) [*Post*, pages 194–212.]

(LORD ESHER, M.R.—If a medical man attending a patient should tell all the world what was the matter with him, his professional brethren would consider it infamous. It would be professional infamy.)

(DAVEY, L.J.—The strongest case is where he endeavours to throw discredit on the medical profession so as to get all the work himself.)

Infamy is that which would make an honourable man shudder. (Extracts from the plaintiff's attacks on doctors were here read.) The pamphlet on vaccination which the plaintiff quotes, although he had undertaken never to re-publish it, is a direct encouragement to those whose views are extreme on the subject to violate the law.

(LOPES, L.J.—We have not to consider the weight of the evidence, but if there were evidence to warrant the conclusion come to.)

Coleridge, Q.C., in reply.—Assuming a medical man honestly believes what he says, though it may be something extravagant, it is submitted it is not infamy in him, even though he make money of it.

LORD ESHER, M.R.—In this case the defendants, the General Medical Council, after hearing the plaintiff, a medical man, directed their registrar to erase his name from the register, on the ground that he had been, in their opinion, guilty of infamous conduct in a professional respect, and thereupon the plaintiff brought an action, which was tried before Mr. Justice COLLINS, for a mandatory injunction to restore his name to the register. Mr. Justice COLLINS declined to grant such an injunction, and the plaintiff appeals.

Now the grounds of the claim by the plaintiff were two—first, that one member of the Medical Council who adjudicated upon his case was a person disqualified from so acting, and that that rendered the whole judgment not only illegal but void. The other ground was that there was no evidence upon which the General Medical Council could reasonably find that the plaintiff had been guilty of infamous conduct in a professional respect. It is admitted that if either of these two objections can be maintained the plaintiff would be entitled to the relief he asks. It is contended that Dr. Philipson was incapacitated from taking part in the decision of the council, because he was a person who was or might be biassed; and the first question we have to consider is whether Mr. Justice COLLINS was right in holding that he was not such a person, nor that he was in a position which made his participation in the decision illegal as being against public policy. That Dr. Philipson had any pecuniary interest in the

result is not suggested, but it is suggested that he was a person who might have bias. We are bound to act in accordance with the decision of this Court in *Leeson's Case* [*ante*, page 125], and to discover what it decided, and whether the present case is embraced in that decision. In that case it seems to me, the majority of the Court decided that where the person who has sat in judgment has some monetary interest in the result, however small, the Court will not inquire further whether he were really biassed or in any sense likely to be biassed. The line is drawn there, upon the ground that it is against public policy that a person who has any monetary interest, however small, in the result of the judicial proceedings in which he has to take part as a judge should take part in them. In such a case the Court will inquire no further, and such a person is disabled. But *Leeson's Case* decides that there are other positions or relations of the person who is to be one of the judges of the matter which may incapacitate him from acting; and it was there held that a crucial instance is whether in substance or in fact the Court can say that he was incapacitated. We have now to determine what that means. The question is one of substance and fact in the particular case. What is the fact which has to be decided? If the relation is such that by no possibility can he be biassed, then it seems to be clear that there is no objection to it. But the question is not whether he be or be not biassed. That the Court cannot inquire into. The Court cannot say he was not in fact biassed, therefore he was not incapacitated. There is something, therefore, between the two. Now it has been stated by Mr. Justice Mellor, in *The Queen v. Allen* (a)—that is to say, his phraseology has been adopted, although I think Chief Justice Cockburn and Mr. Justice Blackburn rather modify the statement—that in the administration of justice, whether it is in a recognised legal Court or whether administered by people who, although not a legal public Court, are acting in the same capacity, public policy requires, in order that there can be no doubt about the administration of justice being pure, that any person who is to take part in an inquiry ought not to be in such a position that he might be suspected of being biassed; and the phrase used by Mr. Justice Mellor was, he must be in such a position that he cannot be suspected. Taken literally, I think that is too large, because I know of no case, where a man cannot be suspected. Some people are so perverse that they may suspect without any ground whatever. Now the question of incapacity is to be one of substance and fact. It comes to this, that in substance and fact he cannot be suspected. It is not that any wild or perversely minded person cannot suspect, but

that substantially and in fact the adjudication cannot be suspected. He must bear such a relation to the matter that he cannot be reasonably suspected of being biassed. For the sake of the character of the administration of justice we must go as far as that, but I think in this case we ought not to go any farther. That I take to be the application of the rule laid down in *Leeson's Case*. Then comes the question—If that is so in this case could Dr. Philipson be reasonably and substantially suspected? That depends on the facts in each case of the relation of the impugned judge to the matter to be adjudicated upon by him. Now the relation of Dr. Philipson was this: He had been a subscriber to a society called the Medical Defence Union, formed for the defence of the honour of the profession and to keep its honour intact against the conduct of any individual member of the profession. Being a subscriber he had been vice-president of the society, and by reason of this was *ex officio* a member of the committee to which was entrusted the authority and power to complain of any medical man. But he was only *ex officio* a member, and the evidence is that he never for any reason or on any ground actually acted upon that committee. More than that, before this case came on for decision he had resigned his membership of the society altogether; so that if that were a good resignation he was not only not a subscriber at the time, but not a vice-president nor an *ex officio* member of the committee. It is suggested by Mr. Coleridge that, although he did resign, his resignation was not an accomplished fact until the end of two months. But the substance of the thing is that he did resign his membership. He might perhaps have repented at the end of two months, but he did not. His resignation was dated from the time he made it, for otherwise the two months would not begin to run; therefore he did resign so as not to act, and with the determination not to act, and he never did act again. Under these circumstances, it seems to me impossible that any reasonable person would think that he could be substantially and in reality even suspected of bias. There was nothing upon which to found his suspicion. The first objection, therefore, falls to the ground.

I do not go into instances which were given during the argument, which would make the proposition absurdly large under given circumstances. I take the decision in *Leeson's Case* and say that it must be substantially proved to the satisfaction of those who are asked to interfere that the relation of the impugned judge was such as I have described.

As to the second ground, it is admitted that if there were no evidence upon which the council might fairly and reasonably

say that the plaintiff had been guilty of infamous conduct in a professional respect, then they went beyond the jurisdiction given them by the Act of Parliament in entertaining or proceeding with the case to adjudication. The question arises, Was there evidence here of conduct by the plaintiff that would have authorised the General Medical Council in finding him guilty of infamous conduct in a professional respect? I am prepared to adopt a statement of one ground of guilt, amounting at all events to infamous conduct in a professional sense, which has been drawn up by my brother LOPES. It is this: "If a medical man in the pursuit of his profession has done something with regard to it which will be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council, if that be shown, to say that he has been guilty of infamous conduct in a professional respect." The question is not merely whether what the medical man has done would be an infamous thing for any one else but a medical man to do. He might do an infamous thing which would be infamous in any one else, but if it is not done in a professional respect it does not come within section 29. Yet if in relation to his profession—that is, either with regard to his patients or to his brethren—he does that which may be fairly considered infamous conduct in a professional respect, then I think it is within the section. Instances were given during the argument which I will not repeat. I adopt that as a good definition of one state of circumstances, at all events, in which the General Medical Council would be justified in finding a medical man guilty of infamous conduct in a professional respect. Now, was there such evidence in this case? It seems to me that the question must be solved thus: Taking all the evidence that was before the General Medical Council as a whole, did it bring the plaintiff within the definition which I have read of what would justify them in finding him guilty of infamous conduct in a professional respect? Was the whole evidence, taken together, capable of being treated by the General Medical Council within that definition as infamous conduct? I cannot doubt but that it was. It seems to me that any one might fairly say, with regard to the plaintiff, that he has tried to defame his brother practitioners, to induce, by that defamation, suffering people to avoid them, and come to him in order that he might obtain the remuneration or fees which otherwise he would not obtain. If on the whole, what he was doing could be reasonably construed into that, it seems to me to come within the definition, and that the General Medical Council were justified in saying that he had been guilty of infamous conduct in a professional respect. That ground of objection also fails,

and I am of opinion that the judgment of Mr. Justice COLLINS was right, and that the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. That an accuser must not be a judge is in accordance with public policy and natural justice, and is a principle too well established to require any comment. A person who has a pecuniary interest in the result of an accusation cannot adjudicate on it. The inference at once arises that he is interested. But where there is no pecuniary interest, or where no pecuniary interest is suggested, to use the words of Lord Justice Bowen in *Leeson's Case*, it is a question of substance and of fact whether the judge or one of the judges has also been an accuser. Again, adopting the words of Lord Justice Bowen [p. 137]: "Has the judge whose impartiality is impugned taken any part whatever in the prosecution either by himself or by his agents?" I will only cite the words of Lord Justice Cotton in the judgment of the same case before I adduce what I believe to be the rule to be properly derived from this case. They are these [p. 134]: "Then, as regards the question whether they are to be considered as complainants here, we ought to look to substance, and not, because this complaint is brought by the Council in the name of the Union, to say that a person, a member of a union, who has nothing to do, and can have nothing to do, with bringing forward this complaint, is to be treated as a prosecutor or as one of the persons who is bringing forward this complaint." These words are very applicable to the present case, and the conclusion I have drawn from that case is this—that in cases like this, the proper question to be asked is whether or not there is any reasonable ground for suspecting bias—any real substantial ground. Now if that be the proper question, let us apply it to the present case. Was there any reasonable ground in substance and in fact for suspecting any bias in Dr. Philipson? He was a subscriber to the Medical Defence Union. He had been vice-president, and as vice-president he was an *ex officio* member of the committee. The committee was the body which instituted complaints such as the present. As far as I recollect the evidence, he never acted on that committee, and at the time this inquiry took place he had resigned his membership. It was contended that the resignation did not take effect or was not completed for a period of two months. But I take it, in effect, he had resigned his membership. There is also this to be recollected—and I think the evidence amounts to it—that he never heard of this case before the inquiry. Under these circumstances I think the learned Judge in the Court below was quite right in coming to the conclusion that there was no reasonable ground

either in substance or in fact for suspecting any bias in Dr. Philipson. If that be so, the first objection relied on by Mr. *Coleridge* fails. We then come to the other matter—the infamous conduct in a professional respect. The words are taken from section 29 of 20 & 21 Vict. c. 90. This part of the case comes before us in this way. If there were any evidence on which the council could reasonably have come to the conclusion they did, their decision is final. If there were none, their decision can be considered and reversed by this Court if it be thought necessary.

Now it is important to consider what infamous conduct in a professional respect means. The MASTER OF THE ROLLS has been good enough to adopt a definition which with his assistance and that of my brother Lord Justice DAVEY, I prepared. I will read it again : “ If a medical man in the pursuit of his profession has done “ something with regard to it which will be reasonably regarded as “ disgraceful or dishonourable by his professional brethren of good “ repute and competency, then it is open to the General Medical “ Council, if that be shown, to say that he has been guilty of “ infamous conduct in a professional respect.” It is at any rate evidence of infamous conduct such as is contemplated by that section. I do not for a moment say that that is an exhaustive definition, but I think it is a definition strictly and properly applicable to the present case. Assuming that to be the definition of infamous conduct for the purpose of the present case, was there any evidence before the General Medical Council which would justify them in coming to the conclusion that Dr. Allinson had been guilty of professional infamous misconduct within that definition ? It appears to me there was abundant evidence upon which they might find as they did. I do not propose to read any of those advertisements to which our attention has been called. The large body of them which have been brought to our notice lead to the one conclusion, that he was doing all he could to deter people from consulting medical men—his brothers in the profession—inducing people to distrust their remedies and to come to him, holding himself out as the person who could give them that relief and that assistance which they desired. I am of opinion that if that were the whole case on this point it would be amply sufficient. But there is the other matter, to which the MASTER OF THE ROLLS did not allude, with regard to vaccination. It appears to me that the plaintiff’s conduct there most distinctly comes within the definition I have given. The facts very shortly stated are these : He published a pamphlet against vaccination in 1887 or 1888, which met with great disapproval, and which he promised to withdraw. So far as he was concerned, it appears that he did withdraw it from circulation, but it had passed from

his hands into the hands of some society, and he, well knowing that, adopts this line of conduct. He advises his patients to consult that society, knowing perfectly well what advice they would get—namely to learn from the society how to efface the effects of vaccination—in point of fact, indirectly advising those who consulted him to violate the law, and not to adopt the means which the law has thought desirable to enforce for vaccination. I think, on both these grounds, there was ample evidence to justify the council in coming to the conclusion they did—namely, that he had been guilty of infamous conduct in a professional respect.

DAVEY, L.J.—Nothing can be more important than to maintain intact the principle that a man shall not be a judge in his own cause, and to preserve every tribunal of this country which has to adjudicate upon the rights or status or property of any of Her Majesty's subjects or others from any suspicion of partiality. Speaking for myself, if I were at liberty to discuss the judgments delivered by the Lords Justices in *Leeson's Case* I confess I think my mind would go rather with the judgment of Lord Justice Fry. It appears to me to state a general principle easy of application to the circumstances of any particular case. Whereas, the difficulty I have found in applying the judgments of Lord Justice Cotton and Lord Justice Bowen is in extracting from them the exact principle which I ought to apply; and they also seem to me to leave too much to the inferences to be drawn from the circumstances of any particular case; whereas, the true rule seems to me to be a rule which ought to be above and beyond the circumstances of any particular case whether the facts suggest bias or not. I think the true rule is that which is laid down by Mr. Justice Mellor in *The Queen v. Allen (a)*, which my lord has already referred to; but we are bound by the judgment of the majority of the Court of Appeal as laid down in *Leeson's Case*. I accept the explanation of it which has been given, and I adopt it in the sense in which it has been explained by the judgments just delivered; and, applying to the best of my power the principle which is to be evolved from those judgments, I am of opinion that, in this case, there is no ground for holding that Dr. Philipson was disqualified from taking part in the decision of the present case. I ought to add, that even if I were to adopt the judgment of Lord Justice Fry or the words of Mr. Justice Mellor in their most extreme application, I should, in this case, come to the conclusion that Dr. Philipson was not disqualified. Upon the facts, Dr. Philipson was a vice-president of the Medical Defence Union, and as vice-president, according to the constitution of the association, he was a member of the council. But he did not

reside in the place where the meetings of the council were held, and did not apparently attend any of them ; and it appears that he was not even aware of the fact of the prosecution until he had taken his seat as a member of the council. Now that shows that Dr. Philipson was not party or privy to what has been called the prosecution of Dr. Allinson ; but still he might be held disqualified if a member of the council, as such, were disqualified. But here comes a fact to which I attach much more importance than was apparently attached to it by the learned Judge in the Court below—namely, Dr. Philipson's resignation. He had on the 3rd of May—the inquiry being held on the 28th of May—to the best of his power, as far as he was concerned, ceased to be a subscriber or member of the association, and had severed his connection with the association, so far as he could. The mere fact that by the rules a certain time—two months—must elapse before his resignation was accepted does not seem to me to make any difference in the fact that, so far as he could do so, he had severed his connection with the association ; and it seems to me that it would be a straining at gnats were we to hold that under these circumstances Dr. Philipson, according to any rule which might be adopted, was disqualified from taking any part in the decision of Dr. Allinson's case. On the other point I agree with the other members of the Court that there was sufficient evidence upon which the council might act, and evidence from which the council might reasonably and properly infer that Dr. Allinson was endeavouring to discredit and defame the medical profession generally, and shake the confidence of the public in other medical men with a view to his own profit and pecuniary advantage. Taking the language of the advertisements, it is not a question whether Dr. Allinson is right in his views on the subject of medicine and hygiene or not. He may be right, notwithstanding his differing from the majority of his professional brethren. He may be, in the well-known definition, *Athanasius contra mundum*. But there are different modes of stating one's opinions and views, and I may add there are different motives from which views and opinions are enforced on the world. In the present case the language Dr. Allinson has thought fit and has selected to express his views, and the circumstances under which and surroundings with which his advertisements are issued, coupled with the notices, to which our attention has been drawn by Mr. Reid, recommending his own works and his own advice, seem to me, when taken together, to be evidence upon which the defendant council might reasonably hold that his conduct was infamous in a professional respect. I adopt the definition stated by Lord Justice LOPES and adopted by the MASTER OF THE ROLLS, as a test, at any rate, and a standard by which those words may be defined.

There is also Dr. Allinson's conduct with regard to the leaflet on vaccination after he had undertaken not to publish it. I again repeat, in order that there may be no mistake, it does not seem to me that Mr. Coleridge was well founded in saying that, on the evidence before the council, the council must be held to have condemned Dr. Allinson on the ground of his particular opinions on the subject of medicine and hygiene. We have no right to say whether the council were right or wrong in the inference which they drew. All we have to say, and I express my opinion to that effect, is that there was evidence on which they might as reasonable men come to the conclusion they did.

Appeal dismissed.

STEEL v. ORMSBY

1894. May 10.

[10 T. L. R. 483]

See also Minutes of General Medical Council :

Vol. XXX. (1893) 140.

Vol. XXXI. (1894) 35, 36, 189.

Vol. XXXII. (1895) 165, 166, 176, 177, 178.

Vol. XXXIV. (1897) 232.

Medical Practitioner—Assuming title of M.D.—Medical Act, 1858 (21 & 22 Vict. c. 90), s. 40—Conviction—Validity.

This case raised a question of considerable importance as to the right of persons not medical men to assume the title of "M.D.," the usual description of a doctor of medicine or physician in this country. It was an appeal against a conviction by magistrates at Houghton-le-Spring, Durham, under the Medical Act, 1858 (21 & 22 Vict. c. 90), s. 40, for unlawfully assuming the title of "M.D." The enactment is, that any person who shall wilfully and falsely pretend to be, or take the name or title of, a physician or doctor of medicine, &c., or any title implying that he is recognised by law as a physician or practitioner in medicine shall, upon summary conviction for any such offence, pay a sum not exceeding £20. The defendant resided at Hetton-le-Hole, and was a working coalminer, and he had resided there and had, when requested, visited sick persons and supplied them with medicines. He was charged under the above enactment with having wilfully

and falsely taken the title of M.D., thereby implying that he was registered under the Medical Act, 1858. The defendant had signed certificates of death and other medical certificates, adding the letters "M.D." and "B.C.," although his name does not appear in any register showing that he is registered under the Medical Acts; and he did not hold any diploma entitling him to be so registered. It was proved on his behalf, however, that he held a certificate which had been given to him by a joint-stock company, duly incorporated and registered under the Companies Act, 1882, called the General Council of Safe Medicine. The certificate was in these terms:—"The General Council of Safe Medicine, incorporated 1893, Dr. Younger, M.D. (U.S.), president, &c. The Magnetic and Botanic School of Safe Medicine is incorporated to train and educate its members in medical botany, organic magnetism, &c. We having satisfied ourselves that Joseph Steel, of Hetton-le-Hole, Durham, sustains a good moral character, and he having exhibited satisfactory evidence of his qualifications in the various branches of practical, magnetic, and botanic safe medicine, therefore we do hereby certify that the degree of M.D. (B.C.) is awarded to Joseph Steel, who is hereby admitted to the fellowship of Doctor of Botanic Medicine, 15th August 1893." It was also proved that the defendant had on his door plate the words, "Joseph Steel, M.D., B.C., Botanic Physician"—that is, "M.D. of the Botanic College"—and that he had stated that he was not registered. His solicitor cited *Ellis v. Kelly* [*ante*, page 21], and contended that there was no evidence that he had infringed the Act; but the magistrates, having their attention directed to *The Queen v. Baker* [*ante*, page 143], found as a fact that the defendant had wilfully and falsely taken the title of Doctor of Medicine, thereby implying that he was registered under the Act; and they, accordingly, convicted him, but stated a case, on which he appealed.

Mr. *Crumph*, Q.C. (with Mr. *W. M. Thompson*), argued on his behalf, and contended that he was entitled to assume any description or title provided he did not assume to be registered under the Act. He cited *Andrews v. Styrap* [*ante*, page 87] and *The Queen v. Baker* [*ante*, page 143], and contended that the statement of the defendant here was true, for he had a diploma, and he in no way represented that he was registered under the Medical Act. (MR. JUSTICE WRIGHT pointed out that the magistrates had expressly found that the defendant had falsely represented that he was an M.D. (a doctor of medicine), implying that he was registered under the Act, adding that there was abundant evidence of it.)

Mr. *Muir Macenzie*, who appeared for the prosecutor,

pointed out that the certificates given by the defendant were such as could only be given by duly qualified medical practitioners, and signed himself in one of them "M.D. London," which meant a doctor of medicine under the diploma of the London College of Physicians, or a regular medical practitioner. This case was quite different from *Ellis v. Kelly*, where the man had a medical diploma; it was really governed by *Andrews v. Styrap*, in which the Judges rather retracted their former opinion, the foreign body referred to as having given the diploma not having really authority to confer it. So here there was a mere certificate of a joint stock company, without any pretence of medical qualification, or any examination to test it. *The Queen v. Baker* is in point. (MR. JUSTICE COLLINS.—There the man put "registered.") It did not turn on that for he was registered. (MR. JUSTICE COLLINS.—Not as M.D., and the Court thought that he represented that he was so.) It was not a question of registration, but qualification; they are different. It is a question of fact, not of law.

Mr. *Crumph*, in reply.—It is a question of the construction of the statute. What is the meaning of "wilfully and falsely"? The defendant truly described himself on his brass plate as "Botanic Physician" and M.D. of the Botanic College, which is all true. There is nothing false in his description, and he did not assume to be registered.

The Court, however, upheld the conviction.

MR. JUSTICE WRIGHT said he was unable to see any ground for any doubt or difficulty whatever. The section, no doubt, required a statement to be made by the defendant false in fact and known by him to be so. The magistrates had found as a fact that the defendant had wilfully and falsely described himself as M.D., or a doctor of medicine. The evidence was that the defendant, a collier, had got a certificate from a bogus institution which pretended to give diplomas, thereby defrauding the public, and thus had set up in business as a doctor, giving certificates such as could only be properly given by regular medical practitioners, and signing them as "M.D." adding, "B.C." If he had described himself in terms as "Botanical Physician," or "doctor of a botanical college," it might have been otherwise. But there were only the letters "B.C." following "M.D." On the whole he thought there was evidence that the man had wilfully and falsely described himself as M.D., and thought the conviction must be upheld.

MR. JUSTICE COLLINS concurred, observing that some doubt raised by expressions of Mr. Baron Bramwell in *Ellis v. Kelly* had been removed by later cases. It was a question of fact. He thought that it was quite impossible to hold that there was no

evidence on which the magistrates might not find as they had done in a case in which the defendant had signed medical certificates which could only lawfully be given by regular medical practitioners—signing himself “M.D.” and having no diploma or degree, but only some certificate given by some “bogus” institution.

Appeal accordingly dismissed.

REGINA v. FERDINAND

1896. Jan. 13.

[12 T. L. R. 135]

Reported also : 60 J. P. 41.

COUNTY OF LONDON SESSIONS

Medical Practitioner—Unlawfully using title—Foreign diploma—Medical Act, 1858, s. 40—Appeal from conviction dismissed.

John Ferdinand appealed against a conviction by Mr. Sheil, under section 40 of the Medical Act, 1858 (21 & 22 Vict. c. 90), for unlawfully and falsely pretending to be and using the name and title of a doctor of medicine. The penalty inflicted by Mr. Sheil was the *maximum* to which the appellant was liable, £20, with £10 costs.

Mr. *Muir Mackenzie* appeared on behalf of the Medical Defence Union in support of the magistrate's decision; Mr. *Turrell* was for the appellant.

In his opening statement Mr. *Mackenzie* referred to the cases of *Andrews v. Styrap* [*ante*, page 87], *R. v. Baker* [*ante*, page 143], and *Steel v. Ormsby* [*ante*, page 165], which, he argued, established the proposition that if the appellant wrote the letters “M.D.” after his name, even if he added the letters “U.S.A.,” as he sometimes did, he would be liable under this section.

Thomas William Tyrrell, a solicitor's clerk, said that on the evening of Saturday, October 26, in accordance with instructions he had received, he went to Battersea-park-road, where he found the appellant standing in a trap, surrounded by a number of persons. He said, “Are you Dr. Ferdinand?” and the appellant said, “Yes.” Witness said he had a cold, and the appellant sold him a bottle of medicine for 1s. and made an appointment to see him on the following Tuesday. On that day witness called at the appellant's house in King's-road, Chelsea. The appellant

then told him that he required rest, and witness asked for a certificate to show his employers. The appellant gave him a certificate, which he signed, adding to his name the letters "M.D., U.S.A." At a third interview witness asked him whether he was qualified, and he said he was. He gave witness some newspapers, now produced, containing advertisements which he had circulated in the neighbourhood, abusing the medical profession and describing himself as having graduated in the Eclectic Schools of America, and as having "no connexion with these good men." Cross-examined.—The firm by which witness was employed were the solicitors for the prosecution in this case. They were also acting for a doctor against whom the appellant was bringing an action for slander. When he asked the appellant whether he was qualified, he said, pointing to the certificate he had given, "These are my qualifications. If I used them wrongfully, I should be liable to a £20 penalty."

Mrs. Collier, wife of a working man, said she paid the appellant 30s. for three bottles of medicine and two boxes of pills, which her husband had had. In signing the receipt he added to his name the letters "M.D., LL.D., Ph.D., Pa." Cross-examined.—She had been told he was an American doctor.

Mr. *Mackenzie* said he had other witnesses, but the learned CHAIRMAN said there was enough here to call for an answer.

Mr. *Turrell* said the appellant had in fact a diploma from the University of Philadelphia, but he admitted that he had no qualification in this country. He had desired to keep within the law, and had consulted a book, according to which his action was perfectly correct. It was, unfortunately, a book of no authority, the "Guide to Medical Men," by Mr. Wootton and Dr. Forbes Winslow. The learned counsel urged, on the authority of *Carpenter v. Hamilton* [*ante*, page 100], that if the appellant added letters signifying that his degree was American, he was not liable. He also contended that the appellant, so far from representing himself as an English medical man, had vilified the profession, and had set himself up as being superior to them, and had laid stress on the fact that his degree was a foreign one.

SIR PETER EDLIN, K.C., in dismissing the appeal with costs, said the facts were clear. The appellant's signatures were before the Court, and even if they had been unaccompanied by conversations, the mere fact that he added "U.S.A." or "Pa." would not be sufficient to justify him. The Court regarded this as a grave offence. The statute was expressly passed to prevent the mischief which occurred in this case. The conviction and sentence would be affirmed, with costs.

REGINA *v.* LEWIS (STIPENDIARY MAGISTRATE) AND FRICKHART; REGINA *v.* LEWIS (STIPENDIARY MAGISTRATE) AND BRIDGWATER

1896. *May* 19.

[60 J. P. 392]

See also Minutes of General Medical Council :

Vol. XXX. (1893) 139, 140

Vol. XXXI. (1894) 59, 60.

Medical Acts—*Medical Act*, 1858 (21 & 22 Viet. c. 90), s. 40—*Wilfully and falsely pretending to be a doctor of medicine*—*Use of letters “M.D.,” in describing non-registrable title.*

The respondents, Frickhart and Bridgwater, were charged with wilfully and falsely pretending to be respectively doctors of medicine contrary to section 40 of the Medical Act, 1858. In Frickhart's case, the only proof of the charge offered was a copy of the Medical Register for the year, in which her name did not appear, and the evidence of the informant, a retired doctor of medicine, to whom she gave a medical certificate signed with the letters “M.D.,” after her name. She had a degree of M.D., Univ. Zurich, 1877, in respect of which she had at one time been registered. In Bridgwater's case, the only proof was a copy of the Medical Register for the year, in which Bridgwater's name did not appear, and the evidence of the same informant who had twice consulted Bridgwater and received from him, for payment, medical advice and medicine and an unsigned certificate. In Bridgwater's handbills, and on the window blinds of his place of business, he was described as “Dr. Bridgwater, M.D., “U.S.A.” and in his consulting room was hung up what purported to be a diploma of some American university. The magistrate dismissed the summons in either case, on the ground that there was no proof of any wilful and false pretence.

Held, that the magistrate could not be called upon to state a case, as his determination had proceeded solely on a question of fact.

Whether a person having a non-registrable title, and knowing it to be such, by using the title M.D., commits an offence against the statute, and how far the question is a question of fact or a question of law, is doubtful.

Rules nisi ordering Thomas William Lewis, esquire, stipendiary magistrate for the county borough of Cardiff, and Eliza Foster Macdonogh Frickhart, in the one case, and Talbot Bridg-

water in the other respectively, to show cause why the said magistrate should not proceed to state cases for the opinion of the High Court, setting forth the facts and grounds of his determinations upon the hearing of informations against Friekhart, for wilfully and falsely using the title of M.D. contrary to section 40 of the Medical Act, 1858, and against Bridgwater for wilfully and falsely pretending to be a doctor of medicine, contrary to the same section, respectively.

In Friekhart's case, the informant who consulted her, gave evidence of the fact, and that she had given him a certificate, dated the 20th of December 1895, signed with her name, followed by the letters "M.D." The certificate was put in, and also a copy of the Medical Register for 1895, in which Friekhart's name did not appear. It was admitted that she had been registered before 1894, and that the informant, who was a retired medical man, knew she was not registered when he consulted her. Upon this the magistrate dismissed the summons against her, and afterwards refused to state a case certifying as to the grounds of his refusal, that the application was frivolous and that he had dismissed the summons on a question of fact only.

In support of the rule in Friekhart's case, an affidavit has been made by the registrar of the General Medical Council that Friekhart's name had been erased from the Medical Register for infamous conduct in a professional respect pursuant to a resolution of the council dated the 23rd of May 1894, upon an inquiry on the complaint of the Royal College of Physicians of Ireland, who had caused her name to be removed from the licentiates' roll of that college for violation of her declaration on admission. Due notice of this resolution had been sent to her registered address on the following day. Friekhart had been registered as M.D., Univ. Zurich, 1877, and it did not appear that that degree had been taken away from her, although she was no longer registered in respect of it.

In Bridgwater's case the same informant had given evidence that in consequence of handbills given to him in the street he had gone into Bridgwater's place of business 18, Custom House Street, Cardiff, on two occasions in December 1895, the second time being by appointment, and had consulted him medically, and received medical advice from him and medicine and an unsigned certificate for all of which he paid. In the handbills and on the blinds in the windows of the house was the name "Dr. "Bridgwater, M.D., U.S.A." and in the consulting room there was hung up what purported to be a diploma of some American University. A copy of the Medical Register for 1895, in which Bridgwater's name did not appear, was also put in. Upon this evidence the magistrate dismissed the summons upon the ground that

there was no proof of a false pretence for the defendant merely held himself out to be what he was, viz., a doctor of medicine of some American University. And upon application to him to state a case the magistrate refused to do so, giving a certificate in the same terms as in Frickhart's case.

J. W. St. L. Leslie (with him *A. T. Lawrence*) showed cause in both cases.—The magistrate cannot be called upon to state a case. There was no question of law before him for determination. He decided on the facts that there was no evidence of fraud or wilful falsity. It was a question of fact (*Ellis v. Kelly* [ante, page 21]; *Carpenter v. Hamilton* [ante, page 100]).

M. Muir Mackenzie, in support of the rules.—The use of the letters "M.D." imply that the person is a registered M.D. There was a question of law before the magistrate to be decided on that point. He cited *Andrews v. Styrap* [ante, page 87]; *Reg. v. Baker* [ante, page 143]; *Steel v. Ormsby* [ante, page 165]; *Reg. v. Ferdinand* [ante, page 168].

In Frickhart's case judgment was delivered as follows :—

GRANTHAM, J.—Taking into consideration the evidence before the learned magistrate in this case, we think we ought not to make this rule absolute. There was no proof before him of any statement made by the defendant Frickhart which was false in fact and known by her to be so, which, according to the judgment of Wright, J., in *Steel v. Ormsby*, is necessary to bring the party charged within the section. It did not even appear before the learned magistrate that the defendant's name had been erased from the register, as we now know it to have been from the affidavit of the registrar of the General Medical Council. When she was registered, she was registered as M.D., Univ. Zurich, 1877, and it does not appear even now that that degree has been taken away from her, although she is no longer registered in respect of it, by reason of the decision of the General Medical Council, whose decision in such a matter is final. Moreover, this appears to have been the only instance of which proof was offered in which the defendant used the title of M.D. This is not like one of those cases in which it is shown that the defendant has a regular place of business, and practises regularly under the title of M.D., and we think it would be very hard on her to make her fight the question of principle raised by counsel in support of the rule, although that question is, no doubt, an important one.

COLLINS, J.—I am of the same opinion. I do not think it necessary for us to deal with the point of law raised by counsel in support of the rule, because here there was no proof before the magistrate of a false pretence.

In Bridgwater's case judgment was delivered as follows :—

GRANTHAM, ⁵J.—My brother COLLINS has correctly stated the point here. The magistrate has found that the defendant in using the letters “ M.D., U.S.A.,” had no intent to deceive, but from the point of view of counsel in support of the rule the question is whether the use of the letters “ M.D.” with other letters by the defendant constituted a holding himself out as a registered M.D. No case yet has gone so far as to decide that point. And the magistrate here has found on the facts that the defendant did not hold himself out as a registered M.D. I do not see how we are to go behind that. The magistrate has negatived any false pretence. This rule, therefore, must be discharged.

COLLINS, J.—I am of the same opinion. It may be, as counsel in support of the rule contended, that the meaning of section 40 of the Medical Act, 1858, is that a person shall not pretend falsely to be a registered M.D., and that if it be proved that a person having a non-registrable title, and knowing that his title is non-registrable, uses the title M.D., that constitutes an offence against the statute. That is a very important question, but it is impossible to say that that question arises here, for the learned magistrate has found that the defendant did not in point of fact pretend that he had a registrable degree, and if so, the magistrate would be perfectly right in the conclusion at which he has arrived. I do not know whether it would be possible in any way to raise the question I have referred to before a judge and jury. It seems to me that only in that way could one arrive at a clear pronouncement on the law, by a decision as to what would be the proper direction to give to a jury in the matter. On the cases as they now stand there is a complete fog. It is impossible to say whether this is question of law or of fact.

Rules discharged.

EASTBURN v. ROBERTSON

1898. Nov. 16.

[1 Fraser, Justiciary Cases, 14]

Reported also : 36 Scottish Law Reporter, 67 ; 6 Scots Law Times, 193.

See also Minutes of General Medical Council :

Vol. XXXIV. (1897) 266, 267.

Vol. XXXV. (1898) 344, 353.

Vol. XXXVI. (1899) 205, 206.

Offence against Medical Acts — Relevancy — Specification — Medical Act, 1858 (21 & 22 Vict. c. 90), s. 40.

A summary complaint set forth that A. E. of No. 13 C. Street, Glasgow, "calling himself physician and surgeon, professor, "American eclectic, medical specialist, and using the letters, "titles, additions, or descriptions 'A.M.S.' after his name," had been guilty of an offence within the meaning of the above enactment, "in so far as he, during the month of June 1898, "did in Glasgow wilfully and falsely pretend to be, and did "take or use the name or title of a physician, doctor of medicine, "licentiate in medicine and surgery, bachelor of medicine or "surgeon, and other names, titles, additions, or descriptions "implying that he was registered under the said Medical Act, 1858, "or that he was recognised by law as a physician or surgeon, "or a licentiate in medicine or surgery, or a practitioner in "medicine."

The accused was convicted of "wilfully and falsely taking and using "the title or the addition of 'A.M.S.,' implying that he was recog- "nised by law as a practitioner in medicine, in contravention "of section 40 of the Medical Act, 1858."

The Court suspended the conviction on the grounds (1) that the complaint was irrelevant, and (2) that the conviction was a conviction of an offence which was not charged in the complaint.

Complaint—Procedure—Record—Proof—Documents—Summary Procedure (Scotland) Act, 1864 (27 & 28 Vict. c. 53), s. 16, sched. (I.).—The Summary Procedure (Scotland) Act, 1864, s. 16, enacts, that it shall not be necessary in any proceeding under the Act to record the evidence adduced, but that the record shall set forth in the form of schedule (I.) of the Act, inter alia, "a note of any documentary evidence that "may be put in"; and schedule (I.) bears, inter alia, "note "also the production of any documents produced in evidence "by either party."

In a suspension of a conviction on a complaint under the Act, opinions (per the Lord Justice-Clerk and Lord Trayner, Lord Moncreiff reserving his opinion) that the documents thus directed to be noted in the record of the proceedings were documents received as evidence by the presiding judge, and that if a document which was inadmissible in evidence was noted in the record, that would be a sufficient ground for suspension.

On 8th July 1898, Abraham S. Eastburn, 13 Cambridge Street, Glasgow, was charged in the Sheriff Court at Glasgow, on a complaint at the instance of James Robertson, solicitor, Edinburgh, Registrar and Secretary of the Scottish Branch Council of the General Council of Medical Education and Registration of the United Kingdom, established and incorporated by the

Medical Act, 1858, and the Medical Act, 1862, with the concurrence of James Neil Hart, Procurator-fiscal of Court. The complaint set forth "That Abraham S Eastburn, of "No. 13 Cambridge Street, Glasgow, calling himself physician "and surgeon, professor, American eclectic, medical specialist, "and using the letters, titles, additions, or descriptions, 'A.M.S.' "after his name, has been guilty of an offence within the meaning "of the Medical Act, 1858, section 40 thereof, in so far as he, "during the month of June 1898, did, in Glasgow, wilfully and "falsely pretend to be, and did take or use the name or title of, "a physician, doctor of medicine, licentiate in medicine and "surgery, bachelor of medicine, or surgeon, and other names, titles, "additions, or descriptions implying that he was registered under "the said Medical Act, 1858, or that he was recognised by law as "a physician or surgeon, or a licentiate in medicine or surgery, "or a practitioner in medicine, whereby the said Abraham S Eastburn has incurred a penalty not exceeding £20 sterling."

The accused objected to the relevancy of the complaint. The Sheriff-substitute (Boyd) repelled the objection.

Evidence was then led, and on 13th July (the diet having been adjourned to that day) the Sheriff-substitute convicted the accused, the conviction being in the following terms:—"The "Sheriff-substitute, in respect of the evidence adduced, convicts "the said Abraham S Eastburn of wilfully and falsely taking "and using the title or the addition of 'A.M.S.,' implying that "he was recognised by law as a practitioner in medicine, in contra- "vention of section 40 of the Medical Act, 1858, and therefore "adjudges him to forfeit and pay to the Clerk of Court the sum of "£20 of penalty, to be paid by him to the Treasurer of the General "Council of Medical Education and Registration of the United "Kingdom," with £3 3s. of expenses, and granted warrant for recovery of said sums by pouncing and sale in default of immediate payment, and, failing payment or recovery, for imprisonment for ten days.

Eastburn brought a suspension, in which he pleaded, *inter alia* :—(1) The conviction complained of ought to be set aside in respect (a) The complaint upon which it proceeded was irrelevant and wanting in specification, and failed to give the accused fair notice of the offence for which he was tried; (b) Incompetent evidence was admitted, notwithstanding objection to its reception; (c) The conviction is, on the face of it, inept, and does not involve the complainer in any contravention of the Medical Act, 1858.

In support of the plea that incompetent evidence had been admitted, the complainer founded on two certificates, which were

thus described in the record of the proceedings, as among the productions made for the prosecutor, viz., “4. Certificate by “S. Wesley Wilson, dated 28th June 1898; 5. Certificate by “E. Allen, dated 28th June 1898.” Neither S. Wesley Wilson nor E. Allen was examined as a witness. The complainer, in the bill of suspension, averred that the prosecutor, being examined as a witness by his own agent, produced the Medical Register for the United Kingdom as at 31st December 1897, and deponed that the name of the accused was not entered therein; that the prosecutor was further asked by his agent,—“(Q.) Do you know “whether he has been registered in England since 31st December? “(Question objected to. Objection repelled.) (A.) I wrote to “the registrar in England and I had an answer from him a few “days ago that he is not. I also wrote to the registrar in Ireland, “and I got an answer back that he was not. I show you the “certificate. (Q.) Is Mr. Allen, who gives the certificate, the “keeper of the register in England? (A.) Yes. (Q.) And is Mr. “S. Wesley Wilson, who signed the other certificate, the keeper of “the register in Dublin? (A.) Yes.” That counsel for the accused objected that the certificates were not evidence, and that the Sheriff-substitute intimated that he thought that it was enough for the prosecutor to depone that the accused was not on the register, and that the certificates were superfluous.

Argued for the complainer.—(1) The actual charge here—the minor premise—was a mere echo of the 40th section of the Medical Act, 1858; there was no specification of the particular offence which the complainer was alleged to have committed. From the conviction it was to be inferred that that consisted in the use of the letters “A.M.S.”; but no such offence was charged; it was incompetent to read the designation of the accused into the charge. Further, the prosecutor ought to have set forth what, in his view, the letters “A.M.S.” meant. The Act did not prohibit the practice of medicine by an unregistered person, nor the use of any letters after a man’s name; what it prohibited was the use of a designation—letters or other—which implied that the person using it was registered under the Act (*a*). But the letters “A.M.S.” *per se* meant nothing, and it was therefore for the prosecutor to aver and to prove what, in his view, they were to be taken to mean. This he certainly had not averred, and he had not even now made up his mind, apparently, as to their meaning. The conviction ought to be suspended in respect that the complaint was irrelevant for want of specification, and that the complainer had been convicted of an offence which was not charged. (2) The certificates were incompetent as

(*a*) *Davies v. Makuna* [*ante*, page 103].

evidence, the writers being available as witnesses and not having been examined. Yet, as the record of the proceedings showed, the certificates had been admitted in evidence. The meaning of section 16 of the Summary Procedure Act, 1864, and relative schedule, was that documents noted on the record had been admitted as evidence. It was to be assumed that the Sheriff-substitute had taken into account everything that had been admitted in evidence, from which it followed that he had proceeded—to what extent it was impossible to say—on this incompetent evidence. The conviction ought therefore to be set aside on this ground also (b).

Argued for the respondent.—(1) It might be that if the designation of the accused was not to be read into the charge the complaint was irrelevant. But the complaint was to be taken as a whole, and it was sufficient if it gave the accused fair notice of the case to be made against him, which it did. A conviction in general terms, or which merely repeated the words of the complaint, might possibly be bad for want of specification; here, however, the conviction was perfectly specific. As to the letters “A.M.S.” the respondent was not bound to prove, and did not in fact know, what they meant—that was to say, for what words they stood. It was enough that he averred, and that he had proved to the satisfaction of the Sheriff-substitute, that the letters, as used by the complainer, were such a colourable imitation of the abbreviated style of a medical degree or qualification as would lead people to believe that the complainer was a registered medical practitioner. The complaint was relevant and warranted the conviction, if the Sheriff-substitute was satisfied on the evidence. (2) The respondent did not dispute that the certificates were inadmissible in evidence, and had they been the only evidence of a fact essential to the prosecution, that probably would have been fatal to the conviction; but the circumstance that a reference to them entered the record of the proceedings was not of itself sufficient to warrant a suspension. The reference to documents in the record of proceedings was intended to be no more than a note of productions. It was clear from the complainer’s own account of what took place that the Sheriff-substitute had disregarded the certificates as superfluous, and that he held it sufficiently proved by other evidence that the complainer’s name was not on the register. Further, the register last published was produced, and it was proved that the complainer’s name was not there; it lay on the complainer, therefore, to prove that he was qualified (Medical Act, 1858, s. 27).

(b) *Oliphant v. Wilson*, Dec. 12, 1889, 17 R. (Just. Cases) 12, 2 White, 403; *Provan v. Malloch*, June 8, 1891, 18 R. (Just. Cases) 53, 3 White, 18.

LORD JUSTICE-CLERK.—This prosecution takes place under a special statute, making that which may not have been wrong otherwise into an offence against public policy. That which was charged against accused was not what may be called an offence *in se*. It was only made an offence subject to a penalty imposed by statute, the object being, we all understand, to protect the public against persons professing to practise as medical men or surgeons under qualifications which they do not possess. Now, it is quite plain that in dealing with such a matter the greatest caution and care must be taken. Mr. Guthrie said—and I think it was said more than once in the course of the debate—that the objection to the charge here is a technical objection. But I am not quite sure that that is a correct description of the objection. Even if it be a technical objection, we must see whether that technical objection is such as to indicate that injustice may be done by not giving effect to it. Now, here we have a charge drawn up in a very extraordinary form indeed. The general skeleton of the form is according to the form of the old-fashioned indictment. It names the person and proceeds to describe him, and then proceeds to make a charge against him. Ordinarily the description of the person in such a charge is merely sufficient to identify who he is, and that he resides in such and such a street in Edinburgh, or in such and such a street in Glasgow, or as the case may be. But here the prosecutor, with rather an indication of irony, gives the address, and then says, “calling himself physician, “surgeon, professor, American eclectic medical specialist, “and using the letters, titles, additions, or description ‘A.M.S.’ “after his name.” Now, plainly, I think that cannot be held to come into the charge in any way whatever, for it is not said when he held himself out as that, and it is not said where he held himself out as that. That is the name which he gives himself. There is nothing contrary to the law in that. But then the prosecutor goes on, in the form of the old indictment, to state that the accused has committed a breach of a section of the statute. That is the first statement of accusation which is made against him—in so far as he did, in a certain month, in Glasgow, do certain things. What is he described as doing? It is just a general description, including everything that is intended to be attacked by the statute, taken bodily and imported into this complaint. That is not the usual way of stating an offence against a man, because it is a way absolutely devoid of any specification. It simply just says, “did pretend to be, and did “take or use the name or title of a physician, doctor of medicine, “licentiate in medicine and surgery, bachelor of medicine, or “surgeon, and other names, titles, additions, or descriptions,

“implying that he was registered under the said Medical Act, 1858.” I am quite unable to hold that to be a relevant charge. Mr. *Clyde*, with his usual clearness of mind and frankness, acknowledged that unless the description which had been given of the gentleman at the beginning of the charge could be in some way imported into and read with the accusation, he could have no grounds for maintaining that this was a relevant charge. I am quite clear that these words cannot be brought down or read into the charge. The charge begins specifically with the statement that he committed an offence—that he did, on a certain date, at a certain place, do certain things; and that charge, and that charge alone, can be taken; and what is given in the way of statement or designation at the beginning of the complaint cannot be imported. That would be sufficient for the decision of the case; but I think, in view of what has happened, that I ought to refer to one or two other matters.

One is, that while the charge is what I have read, the conviction does not apply to that charge, because the conviction convicts him only of using the letters “A.M.S.” after his name, implying that he was recognised by law as a practitioner in medicine in contravention of section 40 of the Medical Act. The charge is that he used certain names given and “other names, titles, additions, or descriptions.” Of course, according to the usual interpretation of such words in an indictment, the other names, titles, additions, and descriptions must be similar to those which are specified; but surely, whether similar or not, they must have some meaning that can be stated, and if the letters “A.M.S.,” which are made the ground of the conviction, are not given in the accusation of offence at all, I do not see how he can be convicted of having used them. The prosecutor knew quite well that the accused used them, and he could say he used them, for at the beginning of the indictment he says that he used them. There are no such letters in the charge, and these are specific letters and must have been intended to have had some meaning. The prosecutor does not say what meaning they are intended to have in any intelligible way, and it is simply said that he used the titles implying that he was recognised by law as a physician or surgeon, but how implying, or recognised as what, is not stated. I think that the proceedings in these two respects; namely, in holding this charge relevant and the form of the conviction which followed, are faulty, and that it will be necessary that this conviction be quashed.

I only wish to add, although it is not necessary for the decision of the case, that most undoubtedly here incompetent evidence must have been received. I mean these certificates, which could

only be evidence *per se*, that is to say, by themselves, if the statute made it competent to use such certificates without authenticating evidence of their genuineness and their effect. I cannot accept the view which was suggested that this note required by the statute is a mere note of productions, because it is not so. The statute expressly declares that what the Sheriff or other Judge is to note (after noting the names of the witnesses) is a note of any documentary evidence that may be put in, and the schedule of the Act of Parliament says,—“Note also the production of any document produced in evidence by either party.” That must be a document which the Judge had accepted as being evidence in the case. And I wish to say this, that I think Judges of the inferior Courts should be very careful in this matter. The Judge is apt to think that anything that anybody produces may be noted, and that then he will consider whether he will give effect to any of these documents or reject some of them as having no effect in his judgment. That may be a very fair way for him to consider the matter, but it is not the procedure of the statute, and does not give the safeguard intended, for, as was pointed out by Lord TRAYNER in the course of the discussion, according to the way in which these summary proceedings are noted, we can know nothing of how he dealt with documents, except that he received them in evidence if noted, and therefore we must take it that they were tendered and received as evidence. We cannot tell—for there is nothing requiring him so to state—whether objection was taken to the production of any document, and to its reception. My opinion is that in all cases where documents are received as evidence which are not evidence, that miscarriage would be ground for demanding that the conviction be quashed.

I am for giving my decision on the two matters first mentioned, namely, first, that the complaint is irrelevant, and second, that, relevant or irrelevant, the conviction was not a conviction that could be pronounced on this complaint.

LORD TRAYNER.—I agree so entirely in the criticism which your Lordship has made on the complaint and conviction that it is almost unnecessary to add a single word. But I do not know that I have ever come across a complaint which was more faulty in its construction than this one, or gave less notice to the accused of that which was intended to be proved against him. The complaint, as your Lordship has observed, is framed after the fashion of the old indictments, and the major premise of the indictment is that the accused was guilty of an offence within the meaning of the Medical Act, 1858, s. 40, and the minor premise goes on, “in so far as”—and without quoting the words

which are given in the complaint, I may state them thus, to show how absurd the complaint is in its construction—he did contravene section 40 of the Act of 1858. In short, the minor premise is a mere reproduction of the major. Now, the prosecutor must have known what it was that he intended to charge the respondent with. That appears from what we have heard at the bar and from what followed in the conviction. Evidently the conviction he asked for is the conviction he got, and it amounts to this, that this appellant was calling himself A.M.S. Now, I think it is very material to note that these letters indicate no known degree in medicine whatever at any university in the United Kingdom or Ireland, and I do not know what the letters mean, or what they indicate, or what they imply. But what is still more strange is that the prosecutor does not know, and does not pretend to know, what these letters imply. As far as I can judge from the complaint and the papers in the case, A.M.S. might as well have been X Y Z or A B C, and any of these three letters, as far as I can tell, might mean the very same thing, but none of them, to my mind, indicate a claim to a title which authorises the holder of that title to practise medicine.

But then your Lordship has pointed out that the conviction is not in conformity with the charge. The charge is a most general one—that he has violated the statute of 1858, in no particular that is given, but simply that he has violated it. The conviction is, that the appellant was guilty of a certain offence, viz., that he used the title A.M.S., “implying that he was recognised by law as a practitioner in medicine.” Now, that is not charged against him at all. Your Lordship has pointed out that you thought the charge utterly incompetent for want of specification, but even if it were relevant, that is not charged in it of which the appellant has been convicted.

I think it important to state, though it is not necessary for the decision of this case, that there has been an irregularity in the procedure of a very serious kind. The Sheriff has received as evidence two letters, and extracts from the minutes of the General Medical Council, which certainly were not competent evidence against the accused. Mr. *Guthrie* said, as it was said yesterday by Mr. *Clyde*, that these were superfluous, and we are told that the Sheriff said they were superfluous, but I would have been much better satisfied if the learned Sheriff had said they were incompetent. But superfluous or not superfluous, they were tendered by the prosecutor as evidence, and were received by the Sheriff as evidence. They can have no other character than that, appearing as they do in the record which the Sheriff kept of the proceedings. That record contains, or

should contain, nothing but the names of the witnesses giving parole evidence, and documentary evidence that is put in. Now, that being the character of the documents noted in this record, I must take it that these documents, certainly incompetent, were admitted in evidence by the Sheriff. But that leads me to another conclusion. The Sheriff or Judge must of necessity have taken into account—I would be doing him an injustice if I thought otherwise—before he came to a conclusion and pronounced judgment, all the evidence laid before him. If he took into account only one part of the evidence, and excluded the rest, he would not be doing his duty. He must take into account all the evidence, and I assume that he did it. But if he took all the evidence into account, then he took into account this incompetent evidence which should not have been there, and I cannot tell how much it influenced his mind or how little. But I do know this, that the evidence on which he proceeded was to some extent incompetent, and in a general view that of itself would be quite enough to set aside the conviction.

I agree with your Lordship that this is not necessary for the decision of this case, for I think the conviction cannot stand when one has regard to the irrelevant character of the complaint on which it proceeded.

LORD MONCREIFF.—In the conviction which is brought under review, the Sheriff has convicted the accused of using the title or additions of the letters “A.M.S.,” implying that he was recognised by law as a practitioner in medicine, and that is the only part of the charge made against him that has been sustained. I think it sufficient for the decision of the case, and the setting aside of the conviction, to sustain the first part of the first plea in law for the complainer, which is, that the complaint upon which the conviction proceeded was irrelevant and wanting in specification, and failed to give the accused fair notice of the offence for which he was tried. Now, I agree with what your Lordships have said as to the structure of this complaint, I think it entirely out of shape. What the prosecutor should have done, and probably wished to do, was, after mentioning the name and designation of the accused, to have proceeded,—“has been guilty of an offence within the meaning of the 40th section of the Medical Act of 1858, in so far as he did, in Glasgow, in the month of June 1898, take, or adopt, or use the letters, titles, additions, or description A.M.S.” I think the complaint should have proceeded to state the way in which he did that, whether he exhibited it on a card or doorplate or advertisement. But we are given no information on that point. But then it was necessary, in order to bring the case within the meaning of the statute, to proceed—

“ thereby implying that he was either a bachelor of medicine or “ a bachelor of surgery,” or some of the names given in the section of the statute. The prosecutor was bound to say what in his view these letters meant and were intended to represent, and he was not entitled to say that they meant one or the other of the name, titles, additions, or descriptions enumerated in the statute. Therefore I think the complaint utterly defective, and I do not see any excuse for presenting it in such a shape.

That, I think, is sufficient for the decision of the case ; but your Lordships have made some observations on the admission by the Sheriff of the two certificates Nos. 4 and 5, which admittedly were incompetent evidence. Now, I so far agree with what your Lordships have said, that I think it is very important that Sheriffs and magistrates should keep in view that productions which they are required to note under the Summary Procedure Act are productions which are put in evidence, and therefore before receiving or noting them, I think a Sheriff or magistrate should satisfy himself that the productions are admissible evidence in the case. This is all the more necessary, because under the 16th section of the Summary Procedure Act, which regulates the matter, the only matters which must be recorded are the respondent’s plea, the names of the witnesses, and a note of any documentary evidence that may be put in. No record is kept of the oral evidence, or of objections to the reception of evidence, and it is therefore all the more necessary that in the event of the case being brought under review the Court of Appeal should know what documentary evidence has been put into evidence, and should be able to judge whether that evidence was competent or not. Your Lordship has given a warning, which I have no doubt will be taken. Great care should be taken in that matter, because, to say the least of it, if incompetent evidence—evidence which is plainly incompetent, as these two certificates were—be admitted, there will be a great risk of a conviction being set aside on that ground alone. In the present case I do not express any opinion as to whether the reception of these two certificates of itself would be sufficient to avoid this conviction. I think the conviction bad, because the complaint is hopelessly irrelevant.

The Court suspended the conviction.

HUNTER v. CLARE

1899. Jan. 24.

[68 L. J. (Q. B.) 278]

Reported also :

[1899] 1 Q.B. 635 ; 80 L. T. 197 ; 63 J. P. 308 ; 47 W. R. 394 ; 15 T. L. R. 161.

See also Minutes of General Medical Council :

Vol. XXXIV. (1897) 163.

Vol. XXXV. (1898) 95, 96, 97, 160, 169, 170, 182.

Vol. XXXVI. (1899) 5, 71, 72, 92, 93, Appendix XIII. pp. 591, &c.

Medical Practitioner—"Physician"—Title adopted by L.S.A. London (1886)—*Medical Act*, 1858 (21 & 22 Vict. c. 90), s. 40—*Medical Act*, 1886 (49 & 50 Vict. c. 48), s. 6.

A licentiate of the Society of Apothecaries of London, registered under the Medical Act, 1886, and qualified by the society's certificate to practise in medicine and surgery, as well as an apothecary, is not entitled to describe himself as a "physician"; but in order to support a conviction under section 40 of the Medical Act, 1858, such description must have been adopted "wilfully" as well as "falsely" (a).

Case stated by Justices before whom the appellant had been convicted of wilfully and falsely pretending to be, and taking and using the name and title of, "physician," contrary to section 40 of the Medical Act, 1858.

The appellant was a licentiate of the Society of Apothecaries of London, a duly registered practitioner, and entitled under the Medical Act, 1886, to practise medicine, surgery, and midwifery. He made use of the name and title of physician by causing to be printed and delivered to certain of his patients billheads bearing the words "To Kingsley Hunter, physician, surgeon, &c."

The appellant contended that since he possessed a diploma of the Society of Apothecaries of London, which stated that he possessed the knowledge and skill requisite for the efficient practice of medicine, surgery, and midwifery, and was registered under the Medical Act, 1886, he was, by virtue of section 6 of that Act, entitled to take and use the titles of physician and surgeon if he thought fit. Further, that, notwithstanding the use of the name or title of physician, there was nothing to show that he wilfully and falsely used the same ; on the contrary, that he

(a) [See, as to the Apothecaries Act, 1907, Introduction, page xxxii, *ante*.]

did so in good faith. Moreover, he was authorised and justified in so doing in consequence of the following note which purported to be issued by the Society of Apothecaries of London: "The "L.S.A. (1886) can call himself by any title or titles which he "prefers to adopt denoting his right to practise medicine, surgery, "and midwifery, provided that he does not directly or indirectly "assume a title conferred by another licensing body or university."

The respondent contended that the case was covered by *Regina v. Baker* [*ante*, page 143].

Haldane, Q.C., and *J. H. Condy*, for the appellant.—The question is whether the expression "physician" means a legal practitioner or one licensed by one of the governing societies. The term "general practitioner" points to something apart from specific qualification. A man who calls himself a surgeon means that he possesses that qualification; but his doing so need not imply that he belongs to the College of Surgeons. In *Att.-Gen. v. Royal College of Physicians* [*ante*, page 28] the Apothecaries' Company sought to restrain the College of Physicians from granting licences to compound and supply medicines; but Wood, V.-C., took a wide view of the question, and held that the field of medicine was far more open than the Society of Apothecaries suggested; and that the practice of the licentiates of the college complained of was not an invasion of privileges of the society; and at this day an apothecary can prescribe and a physician dispense. *Regina v. Baker* is distinguishable, for there the practitioner's qualification was in date prior to 1886; he was only on the register as an apothecary, and not registered, as the appellant has been, under the Act of 1886 in respect of additional qualifications in medicine and surgery requiring examination in those branches. The Medical Act, 1858, does not prohibit unqualified persons from practising medicine, its object being to enable the public to distinguish between qualified and unqualified practitioners (*Davies v. Makuna* [*ante*, page 103]). In the present case the title "physician" has been used by the appellant in the same sense as "general practitioner" without any wilful intent to deceive.

Muir Mackenzie, for the respondent.—The status of a physician is wholly distinct from that of an apothecary, and it was not till the passing of the Medical Act, 1886, that the Legislature conferred on licentiates of the Society of Apothecaries the right of practising medicine and surgery. *Ellis v. Kelly* [*ante*, page 21] is valuable for the *dietum* of Bramwell, B., that section 40 of the Medical Act, 1858, is intended to guard the public against being imposed upon, and that the wilful and false assumption of the title "Doctor of Medicine" by a person duly registered as a

surgeon is an offence within the Act. Although the Society of Apothecaries has received the privileges of the Medical Act, 1886, and their licentiates may practise medicine, yet that does not entitle them to call themselves physicians (*Andrews v. Styrap* [ante, page 87], *Regina v. Baker* [ante, page 143], *Blogg v. Pinkers* (b), *Royal College of Physicians v. General Medical Council* [ante, page 147], and *College of Physicians v. Rose* (c)).

Haldane, Q.C., replied.

LAWRANCE, J.—The question is whether a person holding a certificate of the Society of Apothecaries of London, enabling him to practise medicine and surgery as well as to act as an apothecary, is entitled to describe himself as a physician ; or whether in doing so he contravenes section 40 of the Medical Act, 1858. In my judgment he is not so entitled, and if he wilfully and falsely describe himself as a physician, he can be convicted under that section. Up to the year 1886 the only certificate granted by the Society of Apothecaries of London was one to practise merely as an apothecary. In that year a determination was arrived at, that for the future no certificates or licences should be granted by the governing bodies of the three branches of the profession unless the candidate had passed qualifying examinations in all three. The present appellant passed the three examinations. From certain correspondence which forms part of the case, it appears that, in the first place, he described himself “ M.D.,” and I gather that he had some foreign diploma which he considered entitled him to do so. The adoption of this description was objected to by one of the governing bodies of the profession, and he qualified it in various ways, and ended by describing himself as “ physician.” Now, what was the real meaning of the word “ physician ” as adopted by the appellant ? Did he use it as a mere description of doctor in a colloquial sense, or did he adopt it in order to imply that he held a medical degree of a university or a diploma entitling him to say he was “ M.D.”—that is, something he was not, and that therefore he was entitled to describe himself as physician ? In my judgment, he adopted this description in the latter sense, and the Justices were, upon this point, perfectly justified in so holding. That is, of course, the main point in the case ; but there is another, and that is whether the appellant wilfully and falsely adopted this false description ; that is to say, whether the description, though false, was wilfully false. I have come to the conclusion, after looking at the case of *Ellis v. Kelly*, that the appellant was not acting falsely, and that the description was not wilfully false. *Andrews v. Styrap*—in which it was

held by Baron Martin that there was ample evidence that the appellant there “wilfully (for he did it on purpose) and falsely” (because he pretended thereby to be on an equal footing with any “regularly bred and registered physician or M.D. in England”) “took, assumed, and used the title of M.D.”—was a far stronger case than this; for there the practitioner only held a worthless diploma. In the present case the clear result of the correspondence is that the appellant admits that he could not style himself “M.D.,” but considers that, holding a certificate, which gives him the right to practise medicine and surgery, he was entitled to call himself a physician. I do not think he was doing this falsely, but for the purpose of asserting what he thought a legal right. Therefore, although the Justices were right in their law on the first point, yet I think that in the absence of evidence showing that the appellant adopted the description falsely and wilfully the conviction should be quashed.

CHANNELL, J.—Upon the whole I am of the same opinion. I think, although not without some doubt, that the appellant did falsely describe himself as a physician. That is the main point on which our decision is asked, and may be stated thus: Is it a true description for a Licentiate of the Society of Apothecaries of London to describe himself as a physician? That depends upon the sense in which the word “physician” is used in section 40 of the Medical Act, 1858. If in that section “physician” merely means a person qualified to practise in physic, then I think the appellant was entitled to call himself physician; because, although it was not so formerly, since the year 1886 a licentiate of the Society of Apothecaries is entitled to practise medicine and surgery in addition to practising as an apothecary, and has to pass examinations in all branches. In a popular sense, therefore, he is entitled to practise in physic, and I do not think that in a popular sense there is any distinction between physic and medicine. But long before the passing of the Medical Act, 1858, “physician” was used in a technical sense as applying to persons in the highest grade of medical practitioners; and in my view it is used in that sense in the statute itself. It seems to me that “physician” is used in a technical sense throughout the statute, importing a particular grade of medical practitioner. In my opinion it is not correct to say that in that sense a licentiate of the Society of Apothecaries of London is a physician. Before 1886 it certainly would not have been a correct expression, and I do not think that since that date we have any binding authority as to the meaning of “physician” in section 40 of the Medical Act, 1858.

At first I thought that *Regina v. Baker* was binding upon us as such an authority, but I am now of a contrary opinion. In

the first place, that case was argued upon a rule *nisi* for *certiorari*, so that any jurisdiction in the Justices was sufficient to support the conviction ; and in the second the practitioner's qualification was of a date prior to the year 1886, and did not authorise him to practise in surgery, which is a department of the practice of a physician. I am therefore of opinion that "physician" in section 40 of the Medical Act, 1858, is used in a technical sense ; that the appellant had no right to it, and that the Justices properly so held. The next question is, Did he wilfully misdescribe himself?—and as to this *Ellis v. Kelly* is a distinct authority. There the practitioner was not really an M.D. in the sense in which the Court understood that description, but he had reasonable ground for thinking he was ; and it was held that there was no evidence that he so wilfully and falsely adopted it as to render himself liable to a penalty under section 40. There the practitioner's qualification was a foreign but a real one ; whilst in *Andrews v. Styrap* it was a bogus one.

In the present case, although we think the appellant incorrectly described himself as physician, he did not do so with wilful falsehood (which I think the case of *Ellis v. Kelly* shows to be required), and therefore his conviction should be quashed. But upon the real point in the case our decision is for the respondent, and not for the appellant.

Appeal allowed.

EX PARTE C. . . A. . . B. . .

[“The Times,” June 21, 1900, page 12]

See also Minutes of General Medical Council :

Vol. XXIX. (1892) 52, 53.

Vol. XXXVI. (1899) 234, 235, 273, 296.

Vol. XXXIX. (1902) 209.

Vol. XL. (1903) 153, 209.

This was an application on behalf of C. . . A. . . B. . . for a rule *nisi* for a *mandamus* to the General Medical Council commanding them to hear an application that the erasure of the applicant's name from the Medical Register might be removed.

Mr. Colam appeared in support of the rule. It appeared that the applicant was tried at the Central Criminal Court in 1892 for forgery. He was convicted and sentenced to nine years' penal servitude. His name was subsequently erased from the Medical

Register. Before his name was struck off and while he was in prison he was served with a notice to attend a meeting of the General Medical Council to consider the charge against him of his having been convicted. A letter which he sent requesting that the inquiry should be postponed did not for some reason reach the Council. It appeared that since his conviction the evidence on which he had been convicted had turned out to be unsatisfactory, but after a most careful consideration by the Home Office no remission of the applicant's sentence was made, and he served the whole time required by law.

MR. JUSTICE GRANTHAM said that no doubt it was a remarkable case. He thought it right to say that he had been in communication with the Home Office and the case had, he found, been most thoroughly investigated there. If the present application were granted the Court would be placing the General Medical Council in the position of judge and jury in a most complex and difficult case as to the guilt or innocence of this man. The Court ought to hesitate long before doing that. The Council were bound to deal with the case at the time of the conviction. They had no right to say it should be postponed for seven years.

MR. JUSTICE CHANNELL said that he was sorry to be of the same opinion. The applicant was convicted on evidence which at the time seemed satisfactory, but which had since appeared unsatisfactory. The applicant's friends had tried to get a revision of his sentence while the man was still in prison and had failed. It was true that the investigation by the Home Office was as satisfactory as was possible, but it was not the same as a rehearing where the prisoner could be heard. The proceedings of the Council at the time were perfectly regular, and this was really a *mandamus* not to hear but to rehear. Probably the Council had a discretion to rehear, but there was no duty upon them to rehear, and therefore the Court could not grant the *mandamus*.

Rule refused.

CLARKE v. M'GUIRE

1908. Dec. 2.

[43 I. L. T. 52]

Reported also :

[1909] 2 I. R. 681.

Justices—Case stated—Service—Prosecution by common in former—Impossibility of service—Jurisdiction of King's Bench

to hear case stated in absence of service—Medical Act, 1858, ss. 40, 42—Case Stated Act, 1858, s. 2.

The defendant, James M'Guire, was prosecuted at the suit of William Clarke, a common informer, under section 40 of the Medical Act, 1858, for falsely pretending to be a qualified medical practitioner, and implying that he was registered under the Medical Acts, and was recognised in law as a physician and surgeon, &c. When the case came on before the justices the defendant's solicitor objected that they could not hear the case, as the sole right to prosecute was vested in the General Council of Medical Education and Registration, the penalty being payable to them, and that, therefore, the present prosecutor could not institute the proceedings. The magistrates on this ground dismissed the summons on the merits, and at the request of the plaintiff stated a case for the opinion of the King's Bench Division as to whether they were right in point of law in so deciding. The defendant immediately afterwards disappeared, and it became impossible to serve him with notice of appeal and copy of case stated as provided in section 2 of Case Stated Act, but these documents were served on the solicitor who had appeared for him at Petty Sessions :

Held (1) where the non-service of notice of appeal and copy of case stated on defendant personally is due to the defendant's own act in leaving the country, a service of these documents on the solicitor who appeared for him at Petty Sessions will, in the circumstances, be sufficient, and the King's Bench Division has jurisdiction to hear and adjudicate on such case stated ; (2) a private person can institute a criminal prosecution under the Medical Act, 1858, and the magistrates were, therefore, wrong in deciding that only the General Medical Council of Education and Registration could bring such a prosecution.

Case stated. William Clarke, a law clerk, summoned the defendant, James M'Guire, before the justices in Petty Sessions at Dungannon, on the 23rd of March, 1908, for that he on the 16th of January, 1908, and on divers other occasions at Dungannon, in the County of Tyrone, not then being a registered medical practitioner within the meaning of the Medical Act, 1858, and the Medical Act, 1886, and the Acts amending the same, and not being a person recognised by law as a physician, surgeon, licentiate in medicine and surgery, practitioner in medicine or an apothecary, "did unlawfully, wilfully, and falsely pretend to be and take and use the " name, title, addition and description of Licentiate of the Royal " College of Surgeons in Ireland, Licentiate of the Royal College of " Physicians of Edinburgh, Licentiate of the Royal College of " Surgeons of England, Licentiate of the Apothecaries' Hall,

“Dublin, Licentiate in Midwifery, and Licentiate of the Royal “College of Physicians,” thereby implying that he was registered under the said Medical Acts of 1858 and 1886, and the Acts amending the same, and that he was recognised by law as a physician and surgeon, licentiate in medicine and surgery, practitioner in medicine, and an apothecary, contrary to the statute 21 & 22 Vict. c. 90. When the summons came on for hearing the solicitor for the defendant objected to the magistrates hearing the case on the ground that the complainant could not maintain the prosecution, inasmuch as the sole right to prosecute was vested in the General Council of Medical Education and Registration of the United Kingdom, the penalty being payable to the treasurer of the said council. The solicitor for the complainant argued that his client could prosecute as a common informer, and referred to *Steel v. Ormsby* [ante, page 165] and *Reg. v. Ferdinand* [ante, page 168]. The magistrates adopted the view put forward by the defendant’s solicitor, and dismissed the case without prejudice without going into the evidence. They, however, stated a case for the opinion of the King’s Bench as to whether they were right in point of law in so dismissing the summons, but before a copy of such case stated and notice of appeal could be served personally on the defendant he disappeared. The complainant, however, served the copy of the case stated and appeal on the solicitor who had appeared for the defendant at the Petty Sessions. The complainant’s solicitor filed an affidavit showing that every effort had been made to trace the defendant and serve him personally with a copy of the case stated and notice of appeal as provided in section 2 of 20 & 21 Vict. c. 43.

Pim for appellant and complainant.—The service here is sufficient. We have served the solicitor who appeared for the defendant, and we have made every effort to trace and serve the defendant himself, but have been unable to do so. Your Lordships have jurisdiction in the circumstances to hear the case stated (*Massereene v. Bellew*, 24 L. R. Ir. 420; *Syred v. Carruthers*, E. B. & E. 469.)

(The Court intimated they would hear the case stated, but would not give their reasons until the conclusion of the argument in the whole case.)

Pim.—There is nothing in this case which prevents a private person acting as prosecutor.

(PALLES, L.C.B.—Why does not the Medical Council prosecute in its own name?)

Pim.—It is not desirable because, for example, they cannot enter into a recognizance. Sections 32 and 37 of the Act show

that even a qualified medical man who is not registered is treated in the same way as an unqualified man who is not registered. The Act is made for the protection of the public generally, and not for the protection of the Medical Council or the medical profession, and, therefore, any member of the public may prosecute. Any one may lay the information where the offence is one of public decency, propriety, and utility (*Cole v. Coulton*, 29 L. J. (M. C.) 125.) A "common informer" was always able to prosecute (*Kenealy v. O'Keeffe*, [1901] 2 Ir. R. 39, at p. 47).

There was no appearance for the respondent.

PALLES, L.C.B.—We have considered the preliminary question as to whether the Court has jurisdiction to proceed in this application notwithstanding that the copy of the ease was not served personally upon the defendant. There were two cases cited that satisfy me we have jurisdiction. The first was *Syred v. Carruthers*, a case which came before Lord Campbell, and the second, which is a decision of this Court, we are absolutely bound by, and that is *Lord Massereene's Case*. It is not necessary to consider here how far the logical effect of these decisions can be pushed; but one thing is clear, I think, that where the non-service on the defendant of the copy of the ease stated is the result of the defendant's own act in leaving the country, and where everything has been done that could reasonably be done to serve him, an actual service upon the solicitor who appeared for him at the Petty Sessions is sufficient. If we decided otherwise we should be acting distinctly contrary to *Lord Massereene's Case*, and, I think, distinctly contrary to the principle in *Carruthers' Case*, and, therefore, we hold we have jurisdiction. What will be the effect of this decision in some future cases we will be able to decide when these cases come up. That reduces the ease to the question that is to be tried here, and which has been so well brought before us by Mr. Pim. We first have to decide what is the principle applicable to this case. We are bound by the decision in *Kenealy v. O'Keeffe*. That case was decided after *Bradlaugh v. Clarke* (a) had been decided in the House of Lords, and we commenced by distinguishing—as, indeed, Lord Selborne himself in *Bradlaugh v. Clarke* had distinguished—the case of a civil action from that of a criminal prosecution. In the case of a civil action it was the existence of a private interest in the penalty that gave the plaintiff the right to proceed, and where such an interest did not exist in the plaintiff it followed that a civil proceeding by him would not lie. But in the case of a prosecution the right to proceed did not rest upon pecuniary interest, or upon interest at all. It

[(a) (1880) 5 A. C. 354; 52 L. J. (Q.B.) 505.]

arose upon the common law right of every man to prefer his bill of indictment to the grand jury. After a review of the cases the Court in *Kenealy v. O'Keeffe* arrived at the *prima facie* conclusion that it would be strange in a statute which created a new criminal offence, and did not in express words prohibit the common informer, that he had not the same right that would correspond with the old common law right where the case was an indictable offence. In that case also the English practice and decisions are considered and referred to, and then there is this sentence in the judgment.—“If, however, upon the true construction of the Statute the offence is one against the public, and not against a particular individual only, then I am of opinion, as well upon principle as upon the authority of *Cole v. Coulton* and uniform usage, that the mere circumstance of the entire penalty being appropriated to a person other than the informer does not take the case out of the general rule” ([1901] 2 Ir. R. at p. 47). On the true construction of section 40 of the Medical Act, it appears to me that the object of the section was not to benefit medical practitioners, but to benefit the public by preventing persons having no medical qualifications from representing themselves as having such, and thereby committing frauds upon the public. That appears to me to be established by a line of decisions that have been quoted by Mr. *Pim*, and that extend as far back as to the Act itself in 1858. That satisfies the first of these conditions, that on the true construction of the statute the offence is one against the public generally and not against a particular individual only, and the mere circumstance of the entire penalty being appropriated to a person other than the informer does not take the case out of the general rule. And the result is that the startling decision that a common informer could not institute this proceeding is entirely wrong, and we must answer the magistrate's question by saying they were not right in their decision. The case must go back to them for reconsideration and redetermination, and, of course, the defendant here, though it may be perfectly useless to give the order, must pay the costs. I would like to mention here, in order that there may be no surprise, that we by no means decide that the magistrates have jurisdiction to proceed with this case. The defendant happens to be absent, and not being amenable we hold that his absence does not prevent us from deciding this present application.

END OF THE MEDICAL DECISIONS

THE DENTAL DECISIONS

EX PARTE PARTRIDGE

1887. *Aug.* 1.

[36 W. R. 442]

Reported also :

19 Q. B. D. 467 ; 56 L. J. (Q. B.) 609 ; 52 J. P. 40.

See also Minutes of General Medical Council :

Vol. XXII. (1885) 175, 176, 239.

Vol. XXIII. (1886) 56, 57, 58, 223 to 225.

Vol. XXIV. (1887) 155, 156, 288, 289, 317 to 320, 391 to 393, 430.

Vol. XXV. (1888) 71.

Vol. XXVI. (1889) 204.

Vol. XXVII. (1890) 212, 222, 223.

Vol. XXVIII. (1891) 194.

Vol. XXIX. (1892) 160, 166 to 168.

Vol. XXX. (1893) 17.

Vol. XXXI. (1894) 198.

Dentist—Dentists register—Qualification—Erasure of name on loss of qualification—Dentists Act, 1878 (41 & 42 Vict. c. 32).

Where a person has been placed upon the dentists register kept under the provisions of the Dentists Act, 1878, in respect of a qualification which has since been taken away, his name cannot be erased from the register simply upon proof of the loss of such qualification.

Hence, where a person had obtained a licence from a medical authority, and his name was placed upon the dentists register in respect of such qualification, his name is not liable to be erased from the register simply upon proof that his licence has been cancelled by the medical authority.

Appeal from a judgment of the Queen's Bench Division making absolute a rule for a *mandamus* directing the General Council of Medical Education and Registration to restore the applicant's name to the register of dentists kept under the Dentists Act, 1878.

The applicant in 1878 obtained from the Royal College of Surgeons in Ireland a diploma in dentistry, and as a licentiate of that body his name was, under section 6 of the Dentists Act, 1878, entered in the Dentists Register kept under the provisions of that Act. The Royal College of Surgeons in Ireland granted the diploma on the conditions that the holder would not seek to attract business by advertising or by any practice considered by the college to be unbecoming, and that the diploma would be cancelled on its being proved to the satisfaction of the president and council that he had done so.

In 1885 the Royal College of Surgeons in Ireland cancelled the diploma on the ground that the applicant had advertised for business, and, upon receiving notice of the fact that the diploma had been cancelled, the General Council of Medical Education and Registration erased his name from the dentists register.

The Divisional Court (MATHEW and A. L. SMITH, JJ.) having made the rule for a *mandamus* absolute as above, the general council appealed.

Kennedy, Q.C., and *Muir Mackenzie*, for the appellants.—Keeping a register under section 11 means keeping a correct register. There are certain cases specified in sections 12 and 13 in which the name can be erased from the register. But the council must have an implied power to erase the name of a person who has lost his qualification, the power being implied from the obligation to keep a correct register. The applicant, if this *mandamus* goes, may practise in Dublin, though his diploma has been taken away.

Finlay, Q.C., and *Lyon*, for the applicant were not called upon.

LORD ESHER, M.R.—In this case the applicant was, in 1878, a licentiate of the Royal College of Surgeons in Ireland, and in respect of that qualification applied to be placed upon the register kept under the Dentists Act, 1878. Since that time, in consequence of a breach of an undertaking entered into by him with the Royal College of Surgeons in Ireland, that body cancelled his licence, and upon that being brought to the notice of the General Council they, for that reason alone, erased his name from the Dentists Register without acting under the provisions of sections 13 and 15 of the Dentists Act, 1878. The question before us is whether they were justified in so doing, and that question depends upon the provisions of the Dentists Act, 1878. Section 6 deals with the case of a person who is to be placed on the register. “To be registered” means to be placed upon the register. That seems to me to be the natural meaning of that section. The

provisions of section 7 seem to me to show that that is so. It speaks of the qualified person who "pays the registration fee" being entitled to be registered. That means payment of one fee on registration, not payment of an annual fee, and seems to me to show that section 6 applies to the time of putting the name on the register. If that is the true construction of the section, it gets rid of the meaning sought to be placed on section 11. The 1st sub-section of section 11 must refer to the time when the person is placed upon the register. The 2nd sub-section refers to the description and date of the qualifications of the registered persons in respect of which they are registered. The 3rd sub-section is clearly necessary in any view of the case, because names may be erased from the register under the provisions of sections 13 and 15, and other names may be added to it. Up to this there is no provision for dealing with the register except with regard to the original entry of names in it. Section 12, however, deals with the power of erasing from the register the names of deceased persons and persons who have ceased to practise. Section 13 deals also with erasures from the register, giving the General Council power of erasing the names of registered persons in certain specified instances. The General Council are to "cause inquiry to be made into the case of a person alleged to be liable to have his name erased under this section." They are to exercise that power of erasure under the provisions of section 15. The provisions of those two sections seem to me conclusive to show that the power of erasure conferred upon the General Council is a judicial power, and is confined to those matters into which the council can make inquiry—namely, where the case comes within section 13. The power of erasure conferred by section 13 is different from the power conferred by section 12, which is in the nature of a ministerial power. I do not mean in any way to say that the local medical authority may not, by reason of the breach of the condition upon which they granted the licence, strike the name off their register; but I do say that the mere fact that the applicant's name has been struck off the local register by reason of such a breach does not of itself entitle the General Council to strike his name off their register without due inquiry under sections 13 and 15. The Dentists Act, 1878, instituted the Dentists Register, and accordingly the well-known principle of law is applicable—that when a statute institutes a new state of things, the powers of dealing with that state of things must be looked for solely within the four corners of the statute. Therefore, everything with respect to this new register must be found in the statute itself. Though I have arrived at this conclusion, I must add that if the General Council think that the breach of

the condition under which the licence in Ireland was obtained is disgraceful conduct in a professional respect within the meaning of section 13, and I am myself inclined to think that such may, under certain circumstances, be the case, then I think that they would have the power, after due inquiry, of erasing the name from the register. This *mandamus* must go, but the fact of its going does not take away from the General Council their power to exercise jurisdiction under sections 13 and 15 of the Dentists Act, 1878.

LINDLEY, L.J.—This case is one of great importance because we have come to the conclusion that the General Council have no power to remove a name from their register simply on the ground that the name has been removed from the register of the local medical authority, without exercising the powers conferred upon them by sections 13 and 15, the registered person's qualification, in respect of which he was placed upon the Dentists Register, having been derived from the fact of his being on the local register. Whether it is accidental or not, this Act of 1878 differs from the Medical Act, 1858, the power of erasure being more limited in the Act of 1878, and the consequence is that the local bodies have less control over dentists than over medical men. This question turns upon the Act itself. Section 6 seems to me to refer to the original entry of the name in the register, and this view is borne out by section 7. There are certain provisions which relate to the putting of names on the register, and there are certain provisions contained in sections 12, 13, and 15 which relate to the removal of names from the register. There is no provision which enables the General Council to remove a name from the register simply because the name has been removed from the local register. This applicant is entitled to have his name restored to the Dentists Register without prejudice to an inquiry by the General Council, if they think fit, as to whether his case comes within section 13.

LOPES, L.J.—In my opinion it is not sufficient to entitle the General Council to erase the applicant's name from the Dentists Register that he has lost the qualification by means of which he was placed upon the register. I am, however, clearly of opinion, that it is now open to the General Council to take proceedings under sections 13 and 15, and if the case is made out against the applicant under section 13 to erase his name. I will only add that, if upon due inquiry they come to the conclusion that he has wilfully and deliberately acted contrary to the condition imposed upon him when he obtained his diploma, his conduct would come within the words "disgraceful conduct in a professional respect."

Appeal dismissed.

PARTRIDGE *v.* GENERAL MEDICAL COUNCIL1890. *May* 5.

[38 W. R. 729]

Reported also :

25 Q. B. D. 90 ; 59 L. J. (Q. B.) 475 ; 62 L. T. 787 ;
55 J. P. 4.

See also Minutes of General Medical Council referred to on
page 194.

Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 11—Erasing name from Dentists Register—Discretionary duty—Judicial or ministerial act—Action for wrongfully erasing name.

The General Council having wrongfully directed the name of a person to be erased from the register on the ground that he had lost his qualification, a mandamus was issued directing them to restore his name to the register. In an action to recover damages for such wrongful erasure,

Held, that, as the duty imposed upon the General Council by the Act as to giving directions to the registrar in regard to the register was discretionary, the duty was of a judicial character, and not merely ministerial, and the action was not maintainable without proof of malice.

Appeal from the judgment of HUDDLESTON, B., at the trial, without a jury, of an action for maliciously and unlawfully removing the plaintiff's name from the Dentists Register kept under the Dentists Act, 1878.

After the passing of the Dentists Act, 1878, the plaintiff obtained a diploma from the Royal College of Surgeons in Ireland as a licentiate in dental surgery, and was entered by the defendants in the Dentists Register in respect of this qualification.

The Royal College of Surgeons in Ireland granted the diploma on the conditions that the holder would not seek to attract business by advertising or by any practice considered by the college to be unbecoming, and that the diploma would be cancelled on its being proved to the satisfaction of the president and council of the college that he had done so.

In July, 1885, the College of Surgeons in Ireland cancelled the plaintiff's diploma on the ground that he had advertised in connection with his profession, and notified this fact to the

defendants. The defendants thereupon, in June, 1886, ordered his name to be erased from the Dentists Register on the ground that he had lost his qualification.

A *mandamus* was issued, directing the defendants to restore the name to the register on the ground that the fact of losing the qualification was not sufficient reason for erasing the name [*Ex parte Partridge*, ante, page 194].

The plaintiff's name was restored to the register in September, 1887.

The defendants subsequently held an inquiry under sections 13 and 15 of the Dentists Act, 1878, and ordered the plaintiff's name to be erased from the register on the ground that he had been guilty of "disgraceful conduct in a professional sense" in advertising.

HUDDLESTON, B., found that there was no malice, and gave judgment for the defendants.

The plaintiff appealed.

Waddy, Q.C., and Lyon, for the plaintiff.—The act of the defendants in removing the plaintiff's name from the register was merely a ministerial act. They did not profess to hold any judicial inquiry or to act under section 13. They considered that they had no option but to erase the name as the qualification was gone. The Court held that they were wrong in that. The plaintiffs cannot now say that they were acting in a judicial capacity. They professed to act under section 11, and their duties under that section are merely ministerial.

They referred to *Pickering v. James*, 21 W. R. 786, L. R. 8 C. P. 489; *Ashby v. White*, 1 Sm. L. C., 11th ed., 240; *Cullen v. Morris*, 2 Stark. 587; *Tozer v. Child*, 5 W. R. 287, 7 E. & B. 377.

R. T. Reid, Q.C., and Muir Mackenzie, for the defendants.—The grounds upon which the defendants acted in erasing the plaintiff's name are immaterial. If the duty imposed upon them by the Act is judicial, and they acted *bona fide*, then they are protected, though they may have acted wrongly. If they acted under section 13, though without holding an inquiry, then their act was clearly judicial. Even if they acted under section 11, inasmuch as they had a discretion to do the act or not—that is, to give special directions to the registrar under subsection 5 as to the register—their act cannot be considered as merely ministerial.

Waddy, Q.C., replied.

LORD ESHER, M.R.—This is an action against the Medical Council for maliciously and unlawfully causing the plaintiff's name to be erased from the Dentists Register. The learned judge found that no malice was proved, and, indeed, I can hardly

conceive how there could possibly be any malice in the defendants towards the plaintiff. Now the defendants' duty in considering whether they should erase a name from the register on account of alleged misconduct is clear. They ought to inquire carefully whether there is any ground for the complaint. If they come to the conclusion that there is, they ought to communicate with the accused and ask him for an explanation. I do not say that they ought to hear the witnesses, if there are any, in his presence ; but at the least they ought to communicate any evidence to him, and ask for his explanation upon it, and if necessary make further inquiries into the matter. Then, and not till then, ought they to decide upon erasing the name. It is quite clear that the defendants upon the occasion in question acted wrongly. They erased the plaintiff's name without holding a proper inquiry, and consequently they were directed by a writ of *mandamus* to restore the name to the register. The question, however, whether such a body as the council has acted rightly in removing the name and the question whether an action will lie against them if they have acted wrongly are two totally different questions. Certain duties are imposed upon the defendants by the Dentists Act, 1878. The defendants in erasing the plaintiff's name were intending to act under the statute. They ought to have acted under section 13, and held a proper inquiry before deciding to erase the plaintiff's name upon the ground of disgraceful conduct in a professional sense. If they acted under section 13 I have no doubt that their act was not a ministerial act but a judicial act. But assuming that they ought to have acted under section 13 and did not, then they acted under section 11, and that being so can their act be called a merely ministerial act when they might have done it or not ? I may state that, in my opinion, if the defendants intended to act under the statute, and erroneously acted under a wrong section, they would not be liable in the absence of malice if the act was not merely ministerial.

Assuming, then, that they acted under section 11, in my opinion their act was not a merely ministerial act. The giving an order to the registrar under section 11 depends upon discretion. I think this proposition is good law. When a public duty is imposed on persons which they undertake to perform, and the performance of that duty depends upon the exercise of discretion, the carrying out of that duty cannot be said to be a merely ministerial act, but must be considered for the purposes of protection as a judicial act. The defendants, in the performance of that judicial duty, were protected in the absence of malice.

In the present case, therefore, there being no malice, the defendants cannot be made liable, and the appeal must therefore be dismissed.

FRY, L.J.—The learned Judge having properly found that there was no malice, the question arises whether the plaintiff has any cause of action against the defendants. The solution of that question depends upon whether or not the act of the defendants was a merely ministerial act. I agree with the proposition enunciated by the MASTER OF THE ROLLS that where there is a discretion to perform a public duty imposed upon a person by statute, the duty is a judicial and not a merely ministerial duty. The scheme of the Dentists Act seems to be this. The registrar is the person who is to do all the ministerial acts in regard to the register. By section 11 he is to keep the register, and by section 12 he is to insert any necessary alterations in it. I also think that the registrar has some duties with respect to the register that are not merely ministerial. By sub-section 4 of section 12 he has a discretion in the execution of his duties to act on such evidence as in each case appears to him sufficient. Then when we look at the duties of the General Council in regard to the registrar we see that by section 11 they are to exercise superintendence over him. By section 11, sub-section 2, they have a discretion as to the form in which the register is kept. Then it is further provided by sub-section 5 that the registrar shall conform to any orders made by the General Council under the Act; and it is also provided that the registrar is to conform to any special directions given by the General Council. In my opinion the duty of the General Council in giving those special directions is of a judicial character. The conclusion I have arrived at upon the facts before us is that the General Council were of opinion that the register must automatically follow the qualification—that is to say, that the retention of the qualification was a condition of the name remaining on the register—and that they had power to make the necessary corrections by giving an order to the registrar to that effect. In that opinion they were wrong. But they were exercising superintendence over the registrar, and had a discretion conferred upon them by the statute in giving the order to the registrar. In my opinion there is no duty imposed upon the General Council in connection with the register which is not discretionary in its nature. I think, therefore, that the General Council were acting in the exercise of a discretion vested in them by the statute, and were consequently acting in a judicial capacity. The appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The defendants in erasing the plaintiff's name from the register acted without malice and *bona fide*, but they made a mistake, thinking that they could erase his name simply because his qualification ceased. Under those circumstances can the present action be maintained? It is admitted that the defendants were acting in the discharge

of a public duty imposed upon them by statute, and intended to act under the statute. If they acted under section 13, it cannot be denied that they were acting judicially. It is said, however, that they were acting under section 11, and that the duty imposed by that section is merely ministerial. It seems to me that as the defendants have power under the section to give special directions to the registrar as to his duties in connection with the register, and as they have a discretion as to those directions, they are acting judicially in giving those directions. Therefore, whether they, the defendants, were acting under section 11 or section 13 they were not acting merely ministerially, and in the absence of malice cannot be made liable in this action.

Appeal dismissed.

PARTRIDGE *v.* GENERAL MEDICAL COUNCIL AND MILLER

1892. *Feb.* 9.

[8 T. L. R. 311]

See also Minutes of General Medical Council referred to on page 194.

Dentist—Register—Removing name—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 13—Nonsuit.

This was an action by a dentist, whose name was formerly on the Dentists Register, to compel the defendants to restore his name and qualification to the said register, and for a *mandamus* to issue if necessary. The plaintiff further claimed an injunction to restrain defendants from removing his name from the register except in accordance with the provisions of the Dentists Act, 1878 (41 & 42 Vict. c. 33). The plaintiff also claimed £10,000 damages for the wrongful erasure of his name from the said register. The defence was that plaintiff's name had been erased from the register under the provisions of section 13 of the Dentists Act.

Mr. *Willis*, Q.C., and Mr. *Beddall* were for the plaintiff; Mr. *Reid*, Q.C., and Mr. *Muir Mackenzie* for the defendants.

Mr. *Willis*, Q.C., in opening the plaintiff's case, said that when the Dentists Act, 1878, was passed it was directed that a register of registered dentists should be kept, and that unless a dentist's name was on the register he could not sue for his fees, and

was liable to certain penalties for describing himself as a dentist. The plaintiff, in 1868, after a course of study at the hospitals, under well-known professors, began to practise, first at Baker-street and later on at South Kensington. By section 6 of the Dentists Act, it was enacted that any person who—(1) is a licentiate in dental surgery or dentistry of any of the medical authorities, or (2) is at the passing of this Act *bona fide* engaged in the practice of dentistry or dental surgery, shall be entitled to be registered under this Act. The plaintiff did not wish to register on the second ground, and, accordingly, after examination, obtained a diploma from the Royal College of Surgeons in Ireland, under which qualification he claimed registration. One of the terms imposed by the Royal College was that no one holding their diploma should advertise himself in any way, under pain of forfeiting his diploma. This condition was accepted by the plaintiff, and until a later period the college made no complaint against him. In 1881, however, his sight began to fail, and in 1882 he became quite blind. The plaintiff, although he could no longer himself do any manual labour, was perfectly competent to advise those who were his assistants. He therefore formed the idea of establishing what he called the “South Kensington Ladies’ Dental Institution and Association,” to treat ladies in reduced circumstances and others at a reduced scale of charges. In order to make the institution known it was necessary to bring it before the public, and circulars were accordingly sent out. In 1883 the college heard of the plaintiff’s advertising his institute, and plaintiff, who at that time thought that the loss of his diploma would entail the loss of his right to be on the register, no doubt tried to keep matters straight. In July, 1885, the college cancelled his diploma, but not until June, 1886, did the defendants strike plaintiff’s name off the register. This, the plaintiff expected, would be the result of the diploma being withdrawn, but in February, 1887, he was advised to apply that a writ of *mandamus* should issue to the General Medical Council to replace his name on the register. In June, 1887, the rule was made absolute by a Divisional Court, who held that, although plaintiff had lost his diploma, he was still entitled to be on the register. The defendants appealed, but the Court of Appeal affirmed the judgment of the Divisional Court, and plaintiff’s name was accordingly restored to the register. Plaintiff now thought all his troubles were at an end, but he soon found that his relations with the Royal College were to be construed into “disgraceful conduct in a professional respect” under section 13 of the Dentists Act, and that his name was to be erased a second time from the register. On November 8, 1887, a communication was sent by the council to the Royal College suggesting

that inquiries should be made as to plaintiff's conduct, and on November 10, before any reply had come or any actual charge been made, plaintiff received notice from the council that a charge under section 13 of the Act was being made against him. On November 12 the Royal College wrote making a charge against plaintiff, and asking that his name should be erased from the register. In the letter of November 10 plaintiff was informed that the case would be investigated, by a committee appointed under section 15 of the Act, on November 23, and that he could make his defence in writing and attend to establish any facts he might wish to submit. On November 18 plaintiff replied that the charge was the outcome "of a suggestion made by one of the "Judges in the Court of Appeal," and that at the time when he promised not to advertise he did not expect to become stone blind, and, under the circumstances, he considered himself justified in the course he had adopted, his institution, unlike so many others, being a genuine one. On November 21 plaintiff was informed that the report in his case was to be made on November 24, and on November 23 he was informed the report would be considered on November 25. On November 25 a meeting of the council was held, about 25 members being present, of whom six were connected with the Royal College of Surgeons in Ireland. The plaintiff did not appear, and it was resolved—(a) that plaintiff had committed the offence charged—*i.e.*, that he had advertised himself; (b) that his offence was disgraceful conduct in a professional respect; (c) that his name should be erased from the register. The question was, therefore, whether "mere advertising" could, under any circumstances, justify the council in erasing plaintiff's name from the register. Could it be held to be professional misconduct, or was it not one of the "trivial "offences" contemplated in the same section (13) of the Act, which were not to be a ground of erasure? The defendants were both accusers and judges in this matter, and could not be held to have made an honest use of the power and discretion vested in them.

The whole of the defendants' answers to interrogatories and various minutes of the council having been read,

Dr. Septimus Gibbon, examined, said he had known plaintiff for some years. He became a patron of his institution and allowed his name to appear on plaintiff's circulars. On October 7 he received a letter from Mr. Miller, the registrar of the council, purporting to be written by direction of the president. It was on the subject of his name appearing on the circular. He then withdrew his name from the circular. Not cross-examined.

Henry Francis Partridge, examined, said he was a surgeon

dentist from 1866 until his name was erased from the register. In 1878 he signed a declaration that, while he held the diploma from the Royal College of Surgeons in Ireland, he would not advertise. At that time he had no intention of doing so, but when he became blind he found that his best patients were leaving him and he had to see what he could do to avoid ruin. He conceived the idea of founding the South Kensington Ladies' Dental Institution. The motto was to be "*maximum value at minimum cost.*" He advertised at a cost of thousands of pounds. Then imitators arose and he had to advertise still more. He had the support of over two dozen medical men and used their names with their sanction. He thought that if he lost his diploma he would lose his right to be on the register. Under sections 3 and 4 of the Act he would render himself liable to various penalties if, not being on the register, he continued to practise. He kept his diploma hung up in the surgery, and that was one of the reasons why he did not return it to the college at the time it was cancelled. The first erasure of his name from the register affected his business, but the second removal was a much more serious cause of loss, as the public, seeing that so many dentists advertise, would not believe that that was the reason why his name had been struck off the register. Medical men withdrew their support, and he was unable to sue in respect of work done or services rendered. This prevented him from giving credit and that caused a further loss. He had lost £2,000 a year since 1887 from being off the register. He had been prosecuted by the British Dental Association and fined £5 and £3 3s. costs since that date.

Cross-examined by Mr. Reid, Q.C.—He was prosecuted in July, 1888, for calling himself a dentist. It was not for using the letters "L.D.S." after his name. He used "Late L.D.S." While he held the diploma from the Royal College of Surgeons in Ireland he spent over £10,000 in advertising. He had promised in 1883 to discontinue the particular circular the Royal College objected to, but he made no pledge as to the institution or association. He did not wish to be hampered by the diploma. He did not mean the Royal College to think he would not advertise the institution. When his first case was in the Court of Appeal (*Reg. v. Medical Council, &c., ex parte Partridge* [*ante*, page 194]) Lord Esher, Master of the Rolls, and Lord Justice Lopes both made remarks about his conduct towards the Royal College of Surgeons. He had also sued the council in respect of their first erasure of his name from the register (*Partridge v. Gen. Med. Council, &c.* [*ante*, page 198]). That case went against him, on the ground that there was no *mala fides* on defendants' part. No medical men had complained of his having used their names

on his circulars without their sanction. He claimed £10,000 damages. He claimed for all his bad debts, £563, for which he could not sue. He also claimed for the sum he had spent in advertising, £5,000, which sum had been thrown away because of his being taken off the register. He claimed £3,500 for the circulars he had sent out explaining the cause of his removal from the register, besides the cost of altering his cards, plates, and lamps. He also claimed for the fine and costs he had had to pay in 1888, and for all repairs and expenses he had been put to since January, 1888, in respect of his business premises. These losses were not due to his failing health, but to the action of the defendants in wrongfully erasing his name from the Dentists Register.

Re-examined by Mr. *Willis, Q.C.*—Some of his patients had, since his removal from the register, given him notice that they would plead that to any action he might bring against them in respect of fees. None of the medical gentlemen's names who were on his prospectus were used without their sanction. None of these gentlemen complained of their names being used until May, 1888. His prosecution at the Westminster Police-court on July 31, 1888, was for using the "title of dentist." He had never hawked his circulars about or sent them out underlined. The Royal College of Surgeons in Ireland had complained of his advertising in 1883, but his diploma was not cancelled until July, 1885.

Mr. Skrimshire, examined, said he had been secretary to the plaintiff since January, 1889. Plaintiff's gross receipts were—From June, 1885, to June, 1886, £4,472; from June, 1886, to June, 1887, £4,334; from June, 1887, to June, 1888, £4,790; from June, 1888, to June, 1889, £3,977; from June, 1889, to June, 1890, £3,506; from June, 1890, to June, 1891, £3,112; and from June, 1891, to December, 1891, £1,200.

Cross-examined by Mr. *Reid, Q.C.*—The best year was from June, 1887, to June, 1888, after plaintiff's name had been erased from the register. That was because it was the Jubilee Year—everything was better that year. Plaintiff's health had failed more rapidly since his name was erased from the register.

Mr. William Ash, M.R.C.S.Eng. and L.D.S.Eng., examined, said he had been 30 years a dentist and assisted plaintiff. Plaintiff's practice had gone off since his name was erased.

Not cross-examined.

Mr. Edmund Pinto, examined, said he had been with plaintiff to learn his business since 1887. Plaintiff's practice had fallen off since that date.

Not cross-examined.

At the conclusion of plaintiff's case—

Mr. *Reid*, Q.C., on behalf of the defendants, submitted that there was no case to go to the jury. If the council had acted *bona fide* after a due inquiry as required by the Act, this Court had no jurisdiction (*Allbutt v. General Medical Council* [ante, page 117]). This was a case under the Medical Act, but the same principle would apply to the Dentists Act. In *Partridge v. General Medical Council* [ante, page 198] it had been held no action would lie unless there was *mala fides* on the part of the council. *Leeson v. General Medical Council* [ante, page 125] was to the same effect. There was no evidence for the jury that defendants had acted either maliciously or without reasonable and probable cause.

Mr. *Willis*, Q.C., for the plaintiff, submitted that medical cases could have no bearing on dental cases, as they were under separate Acts, the words of the Acts not being the same. Under section 15 of the Dentists Acts, the Dental Committee were to report facts on which the council were to act. It was not for the jury to say whether there was any "evidence" of disgraceful conduct before the committee, but whether there was any "proof" of disgraceful conduct as defined in section 13. In *Reg. v. Owen* (15 Q. B. 476) it was held that a similar question arising under 9 & 10 Vict. c. 95, s. 24 was for the jury. The questions for the jury were:—First, was there any "proof" of disgraceful conduct in a professional matter before the Dental Committee? Secondly, were not the plaintiff's accusers his judges—*i.e.*, was not a member of the Royal College of Surgeons in Ireland, who had taken a part in formulating the charge against plaintiff, one of the persons who tried him? If so, the conviction could not stand (*Reg. v. London County Council, ex parte Akkersdyk*, [1892] 1 Q. B. 190; *Reg. v. Justices of Hertfordshire*, 6 Q. B. 753). Thirdly, did plaintiff have a proper notice given him by the defendants of the step they were about to take, and did he have an opportunity of attending to defend himself? All the notice he had was the letter of November 10, that he "might attend to "establish any facts," and two letters of November 21 and 23 to inform him that the report would be considered on November 24 and then November 25. He was not invited to attend on those dates. Fourthly, whether or not defendants had not been guilty of malice—*i.e.*, used their powers under the Act from other motives than those which should have influenced them. At the time when plaintiff's name was first removed from the register, the charge of "disgraceful conduct professionally" was never contemplated. It was made afterwards because of the remarks of Lord Esher (Master of the Rolls) and Lord Justice Lopes in the Court of Appeal. The haste with which everything was done was in itself evidence of malice, and the want of proper notice to

plaintiff to attend also showed what the state of the council's mind was at the time when they were dealing with plaintiff's case. It was a foregone conclusion from beginning to end.

Mr. *Beddall* followed on the same side. The real charge against the plaintiff was that he advertised in violation of his undertaking to the Royal College of Surgeons in Ireland, that he would not do so while he held their diploma. Yet the committee wound up their report with this phrase, "Mr. Partridge still "continues to advertise." This showed what was passing in the minds of the Dental Committee. On the point that plaintiff's accusers were his judges, counsel cited *Dimes v. Grand Junction Canal* (3 H. L. C. 759), *Rex v. Gudridge* (5 B. & C. 459), and *Reg. v. Allen* (4 B. & S. 915). On the point as to want of proper notice to plaintiff to appear and make his defence counsel cited *Capel v. Child* (2 C. & J. 558). The case of "Adam and Eve" was the oldest and best known case on this point; they were asked what they had to say before they were punished, but the Medical Council was above hearing any explanation plaintiff might have to make.

Mr. *Reid*, Q.C., having replied,

MR. JUSTICE DENMAN said he had come to the conclusion that there was no evidence to go to the jury on any of the four points relied upon by the plaintiff. It was a painful case to have to deal with, owing to the plaintiff being afflicted as he was. His Lordship then proceeded to review the evidence, commenting on the various dates and facts as he proceeded. He had no option but to nonsuit the plaintiff.

*Judgment for the defendants with costs.
Execution stayed for 14 days,
and until appeal heard if notice
of appeal given within that time.*

1892. March 22.

[8 T. L. R. 453]

This was an application by the plaintiff, H. F. Partridge, for judgment or for a new trial on appeal from the judgment of Mr. Justice DENMAN, who entered judgment for the defendants at the trial before him with a special jury, without taking the opinion of the jury.

Mr. *Willis*, Q.C., and Mr. *A. Beddall* appeared for the appellant and submitted that there was evidence to go to the jury to show that the Council had not properly exercised their powers under the Act. The Council have only power to remove the name "on proof" of the disgraceful conduct in a professional respect. They have no discretion until evidence has been given which in the opinion of the Court is evidence from which they can reasonably come to such a conclusion. Here there was no such evidence. (LORD JUSTICE LOPES referred to the case of *Allbutt v. General Medical Council* [*ante*, page 117].) That was under a different Act—21 & 22 Vict. c. 90, s. 29—and the words are essentially different. The Court is not to inquire if the inference is properly drawn, but there must be some reasonable evidence upon which they could act. Powers of this sort must be watched, otherwise disabilities would be created. (LORD JUSTICE LOPES.—Would it not be disgraceful conduct for a barrister to advertise?) We often see notices in the paper that a barrister has joined a particular circuit, and conduct very like advertising. The charge is not that he advertises in England; many dentists on the register do this. (THE MASTER OF THE ROLLS.—I hope this is not so. I should desire to see the dental profession in the same high position as other medical men.) Another point is that there was one person—namely, Mr. Maenamara—who was in the position both of accuser and judge. Mr. Maenamara was the representative of the Royal College of Surgeons in Ireland on the Medical Council in England, and he acted both in setting the college in motion and in adjudicating on the charge when made. Again, Mr. Partridge was not heard or summoned to be present at the Council. From the above facts an inference of malice may fairly be drawn. The following cases were also cited:—*Leeson v. General Medical Council* [*ante*, page 125]; *Reg. v. Allen*, 4 B. & S. 915; *Reg. v. Milledge*, 4 Q. B. D. 332.

Mr. *R. T. Reid*, Q.C., and Mr. *Muir Mackenzie*, for the respondents, were not called upon.

The Court dismissed the appeal.

The MASTER OF THE ROLLS, in giving judgment, said.—In this case a person, whom I shall call a professional man, has been summoned to appear before a body of which he has become a member. An Act of Parliament has authorised him to be put upon a certain register, and thereby he obtains certain position and benefits. This Act says that if this body, who are a domestic forum, should find him guilty of any infamous or disgraceful conduct in a professional respect they have a right to strike him off the register. They have done this here. Some time ago the plaintiff brought

an action against this body for maliciously striking off his name, and he failed. Now he brings an action partly for a *mandamus* and partly for damages. The greater part of the argument has been directed to the first part of that claim. There is really no evidence on which any one can say these gentlemen were actuated by anything like malice. As to the action for a *mandamus*, all we have to see is whether the body against whom the *mandamus* is asked had jurisdiction to do what they have done. It has been alleged there was no evidence before them which would give them jurisdiction. The council were acting under section 13 of the Dentists Act, 1878. The plaintiff had, on obtaining his diploma in Ireland, promised not to advertise while holding that diploma. That body considered that they should act fairly by each other, and ought not to advertise. Just as in our profession, where all are rivals against each other, a barrister is not allowed to advertise his superior talents or that he will do his advocacy cheaper. I think if he did so I should consider it such disgraceful conduct that he ought to be immediately disbarred. No one need become a member of the dental profession unless he desires it. I say the authorities—this domestic tribunal—have a right to determine if it is within reason whether the conduct is or is not disgraceful professional conduct. In Ireland the defendant had promised not to advertise, and, having given that promise, according to his own evidence, he had spent more than £10,000 in advertising. This is his admission, and he continued to advertise after he had received a warning from the college in Dublin. This must be evidence of disgraceful conduct in a professional respect, and ample evidence upon which the council might exercise jurisdiction. A *mandamus* cannot therefore go to them; they are not a Court and no rules are binding on them; under section 15 a committee is appointed. Fault cannot be found with them, unless you can show that what they have done is contrary to natural justice. I agree it is contrary to natural justice to impose a penalty without letting a man know the accusation and without giving him an opportunity to meet it. It is said the council did not give the plaintiff notice; but this is frivolous in this case, for a letter was written to the plaintiff telling him that his case would be considered on a particular day, and asking him to send any written defence he might desire or to attend in person, or both. He declines to attend, and we are told his reason was that there was no dispute as to the facts. Another point has been taken. It is said there was one person who was accuser and judge; it is against natural justice that an accuser should be also the judge. He must not be both accuser and judge, and it has been argued that Mr. Macnamara was both these in the present

ease. When you look at the facts no one can truly say he was the accuser. The rule of law is well laid down in *Leeson v. General Medical Council* [*ante*, at page 137], as follows :—" It must be in all cases a question of substance and of fact whether one of the judges has in truth also been an accuser." That is to distinguish it from mere technicalities. There is no evidence here that in fact Mr. Macnamara authorised or directed that this accusation should be brought. He received a letter from the secretary to the council in England, and the inference is he handed it to the persons who acted upon it. As to being a judge, it is not shown that he was present at the council at the time the report of the committee was dealt with. Something was also said about his being interested. Even if he acted in Ireland when the college decided to withdraw the diploma, and also in England, even on the same evidence this would not show that he was interested. As Mr. Justice DENMAN has pointed out, the Judge who tried a case might also sit and hear the case in the Exchequer Chamber, and afterwards, perhaps, also in the House of Lords. On no one possible ground can the objections taken be maintained. This Court cannot interfere even if they thought the council had come to the wrong conclusion. I cannot part with this case without saying that, so far from doubting as to whether they were right or wrong, I am perfectly certain they were right. The appeal must be dismissed with costs.

LORD JUSTICE FRY.—One of the duties of the Medical Council is to keep the register required by the Dentists Act, 1878, and by that Act it is provided that, on the application of any of the medical authorities, the council shall make inquiries into the case of any one liable to have his name erased. The Royal College of Surgeons in Ireland is one of those medical authorities. The plaintiff here, notwithstanding his promise to the college which granted him his diploma, habitually advertised and continued to do so after being warned by that college. This was, in my opinion, disgraceful conduct in a professional respect. This was the accusation made against him, and the facts are not in dispute; and yet the plaintiff comes to us to say there was not a tittle of evidence that he was guilty of disgraceful conduct. I say nothing as to whether mere advertising is disgraceful conduct, as the point is not before us; but my silence must not be considered as saying that it is not. There is one point to which I must advert. Mr. Willis made a statement with regard to the Bar which I was surprised and grieved to hear. If what he suggested is true I think it is high time that such things should be brought to the notice of the Inns of Court. As regards Mr. Macnamara, I will only point out that the law is distinctly laid

down by the majority of the Court in *Leeson v. General Medical Council*. I do not think there is any evidence here that Mr. Macnamara was in any sense the accuser. I agree that this appeal must be dismissed.

LORD JUSTICE LOPES.—But for the fact of this being an important case I should not add a word. In this case these facts are all admitted. The plaintiff undertook not to attract business by advertising, or any other conduct which would be considered unbecoming by his college. It is admitted that in violation of this he has largely and extensively advertised, and this after repeated warnings. A *mandamus* can only go if there was no evidence upon which the Council could reasonably act. If there were evidence the decision of the Council is final and conclusive. They are the sole judges. The plaintiff violated his solemn undertaking, and I am of opinion that this was clear evidence upon which the Council ought to find him guilty of disgraceful conduct in a professional respect. As to whether mere advertising would be such conduct, I do not dissent from the expression of opinion given by the MASTER OF THE ROLLS. I must also add that I have heard with great pain certain words uttered by Mr. *Willis* as to the conduct of some members of the Bar. I can only believe that he is mistaken. I feel sure that any one guilty of such conduct would, if he were brought before the Benchers, meet with such punishment as he would rightly deserve. I think here that the plaintiff had ample notice that his case would be considered, and I do not think that there is any evidence that Mr. Macnamara acted both as accuser and judge.

REGINA v. GENERAL MEDICAL COUNCIL (SPERO'S CASE)

1897. *June* 1.

[66 L. J. (Q. B.) 588]

Reported also :

[1897] 2 Q. B. 203 ; 76 L. T. 706 ; 46 W. R. 2 ; 61 J. P. 344.

See also Minutes of General Medical Council :

Vol. XXXIV. (1897) 21.

Dentist—Articled Pupil—Right to claim registration—Dentists Act, 1878 (41 & 42 Vict. c. 33), ss. 6 (c) 7 and 37.

A person articled as a pupil to a dental practitioner at the date of the passing of the Dentists Act, 1878, cannot claim to be registered

under section 37 of the Act unless he has complied with the requirements of section 7, which provides that a person shall not be registered under the Act "as having been at the passing thereof engaged "in the practice of dentistry unless he produces or transmits to the "registrar, before the 1st day of August, 1879, information of "his name and address, and a declaration signed by him in the "form in the schedule" to the Act, "or to the like effect."

Rule calling upon the defendants to show cause why a writ of *mandamus* should not issue requiring them to place the name of the prosecutor, Isidore Spero, upon the Dentists Register.

The prosecutor was at the date of the passing of the Dentists Act, 1878 (July 22, 1878), an articulated pupil. He had paid a premium of £30 to a dentist, for which he was to receive a complete dental education. His articles were for three and a half years, commencing in April 1875, and expiring in October 1878.

The prosecutor did not apply to be registered until 1888, when the defendants refused his application, upon the ground that he was not entitled to be registered.

May 7.—*Muir Maekenzie*, for the defendants, showed cause.—The defendants were entitled to refuse to register the prosecutor. By section 6 (c) of the Dentists Act, 1878, any person who is at the passing of the Act "*bona fide* engaged in the practice of "dentistry or dental surgery" is entitled to be registered. But by section 7 a person is not to be registered under the Act as having been at the passing thereof engaged in the practice of dentistry, unless he produces or transmits to the registrar before August 1, 1879, information of his name and address, and a declaration signed by him in the form in the schedule to the Act or to the like effect. The prosecutor applied to be registered as of right under section 37. The persons referred to in that section are, however, only intended to be put upon the same footing as persons in *bona fide* practice before the passing of the Act, who must comply with the requirements of section 7. The intention cannot have been to place them in a better position. Section 37 adds a class of persons who in a sense were in *bona fide* practice before the passing of the Act, but they are only meant to be registered subject to the same conditions as those imposed upon persons who were in actual practice at the time the Act was passed.

T. Willes Chitty (*Bigham*, Q.C., and *L. S. Green* with him), for the prosecutor, supported the rule.—The prosecutor comes directly within the first part of section 37, and the proviso in section 7 cannot apply to his case. He could not with truth make a declaration in the form given in the schedule. That form applies only to persons in *bona fide* practice before the passing of the Act, whereas the prosecutor's articles did not expire until several months afterwards.

(WRIGHT, J.—It would only have been necessary to add the words, “as an articulated pupil.”)

If the form had been meant to apply to persons not in *bona fide* practice, there would have been a note to that effect. Section 37 introduced a further class of persons who, though not in actual practice before the passing of the Act, were to be deemed to be so.

HAWKINS, J.—I am of opinion that this rule must be discharged. The Dentists Act was passed on July 22, 1878, and by section 6 (c) any person who is at the passing of the Act “*bona fide* engaged in the practice of dentistry or dental surgery, either “separately or in conjunction with the practice of medicine, “surgery, or pharmacy, shall be entitled to be registered” under the Act. It is certain that in July 1878 the prosecutor was not *bona fide* engaged in the practice of dentistry or dental surgery, and was not therefore entitled to be registered under section 6 (c). But there were, no doubt, a number of persons articulated to dentists whose articles would not have expired at the date of the passing of the Act, and it was thought fair to allow them, under certain conditions, to be registered as if they had been in actual practice at that date, and accordingly section 37 provided that “any person who has been articulated as a pupil and has paid “a premium to a dental practitioner entitled to be registered under “this Act in consideration of receiving from such practitioner a “complete dental education, shall, if his articles expire before “the first day of January, 1880, be entitled to be registered under “this Act as though he had been in *bona fide* practice before the “passing of this Act.” The prosecutor comes entirely within the language of that section, and is entitled to be registered as though he had been in *bona fide* practice before the Act was passed. The object of section 37 was, if the articles expired before January 1, 1880, to put a pupil in the same position as if he had been actually engaged in the practice of dentistry before the passing of the Act. Then what would have entitled such a person to be registered? That is provided for by section 7: “Provided that a “person shall not be registered under this Act as having been at the “passing thereof engaged in the practice of dentistry unless he “produces or transmits to the registrar, before the first day of “August, 1879, information of his name and address, and a declaration signed by him in the form in the schedule to this Act or to “the like effect.” I can see no reason why a person put in a position for registration as though he were within section 6 (c) should not be put under the same obligations as a person who is specifically within that section. Then, as to the declaration, I agree that the form in the schedule could not quite apply to this case; but with

the addition of two or three words it could easily be made to do so, and there is no reason why they should not be added. If the form of declaration had been so modified it would have been "to the like effect," and would have complied with the words of section 7. As, however, that was not done, and as the declaration was not made within the prescribed time, there was no obligation on the registrar to put the prosecutor's name upon the register.

WRIGHT, J.—I am of the same opinion. On the whole, I think that the natural meaning of the language used is that persons who come under section 37 must comply with the requirements of section 7. In the present case the prosecutor could well have sent in the declaration if some slight alteration had been made in the form.

Rule discharged.

The prosecutor appealed.

T. Willes Chitty (*Bigham*, Q.C., with him) for the prosecutor, urged the same arguments as in the Divisional Court. He also argued that the construction put upon the statute by the Divisional Court would have the effect of rendering the provisions of section 37 nugatory as regards persons whose articles expired subsequently to August 1, 1879, inasmuch as they could not make the declaration required by section 7 prior to that date.

Muir Mackenzie, for the defendants, urged the same arguments as in the Divisional Court. He further submitted that there was nothing in the statute which would have prevented a person whose articles expired after August 1, 1879, from making the necessary alterations in the form, and sending in the declaration before that date.

LORD ESHER, M.R.—In this case we have to construe certain sections of the Dentists Act, 1878. But for section 37 of the Act, the applicant would have no case at all. That section, however, does not simply entitle him to be registered, but only entitles him to be registered "as though he had been in *bona fide* practice before the passing of this Act." This takes us to section 6, which entitles a person who is at the passing of the Act *bona fide* engaged in the practice of dentistry to be "registered under the Act." We must, therefore, see what a person has to do in order to be registered under the Act. This we learn from section 7. But this section contains the proviso that "a person shall not be registered under this Act as having been at the passing thereof engaged in the practice of dentistry unless he produces or transmits to the registrar, before the 1st day of August 1879, information of his name and address, and a declaration signed by him in the form in the schedule to this Act or to the like effect." In the present case the applicant transmitted

no declaration at all before August 1, 1879. He has, therefore, not complied with the proviso to section 7, and consequently cannot be registered. So the Act of Parliament has provided. It was possible for the applicant to have complied with the provisions of the statute, but he did not do so. He cannot escape from the exigency of the statute by pointing out that there might be a class of persons entitled to be registered who could not possibly comply with the requirements of section 7. The appeal must be dismissed.

A. L. SMITH, L.J.—I agree. The applicant might have complied with the proviso to section 7, and sent in the declaration there mentioned before August 1, 1879, moulding the form in the schedule to meet his case. He has done nothing of the sort, and the Council now object that he is not entitled to come forward in the year 1897 and require his name to be registered. As regards the case of the present applicant, the statute is, in my opinion, explicit. I say nothing as to the case of persons whose articles expired between August 1, 1879, and January 1, 1880. If ever such a case should come before me I will deal with it.

CHITTY, L.J.—The Dentists Act, 1878, establishes a register for dentists, and prescribes a qualification for registration; and it provides by section 3 that after August 1, 1879, no one shall be entitled to use the name of “dentist” unless he is on the register. Sections 6 and 7 state the qualification for registration. If the statute stopped there, the applicant would not be entitled to be registered, but he brings himself within section 37, which provides that a student, such as he was, shall be entitled to be registered “as though he had been in *bona fide* practice before the passing of “this Act.” Those words on the face of them are referential and, although there is a slight alteration in the language from “before the passing of this Act” in section 37, to “at the passing of this Act,” in section 6 (c). I think there is nothing in that slight alteration, and that the words I have read from section 37 refer to section 6 (c). Section 6 (c), however, only states who are entitled to be registered. Section 7 prescribes what is to be done in order to be registered and the proviso to this section referring to the class of persons described in section 6 (c) states that a person falling under that category shall not be registered unless before August 1, 1879, he transmits to the registrar a declaration in the form in the schedule to the Act. Unless he does this before August 1, 1879, he cannot be registered, and comes within section 3 of the Act. A great point was made in argument of the fact that the applicant, whose case is provided for by section 37, could not make a declaration in the form given in the schedule;

but section 7 uses the words “or to the like effect,” and I agree that the meaning of the Legislature was that the form should be moulded to meet the particular case. I think it is very likely that section 37 was inserted after the statute was first drafted, and hence arises the difficulty. Reading the Act as a whole, I find no difficulty in holding that the applicant could have made a proper declaration and so have got his name upon the register. I think there is force in the observation that in the case of persons engaged in the practice of dentistry at the passing of the Act the object of the Legislature was to exclude stale claims. Yet if the applicant’s contention be right he could at any distance of time, although for years he had ceased to have any experience of dentistry, have come forward and insisted upon being registered as a dentist. In my opinion, the good sense of the matter, as well as the true construction of the statute, is against his claim.

Appeal dismissed.

EMSLIE v. PATERSON

1897. *June 12.*

[24 *Rettie* (Justiciary Cases) 77]

Reported also :

2 *Adam’s Justiciary Reports*, 323 ; 34 *Scottish Law Reporter*, 674 ; 5 *Scots Law Times*, 77.

Statutory Offence—Dentists Act 1878 (41 & 42 *Vict. c. 33*), s. 3—*Unregistered person*—“*American Dentistry*”—“*Dental Office*.”

A. Emslie, a person who was not registered under the Act, placed on his door a brass plate with the inscription “*American Dentistry. A. Emslie*”; also another plate, with the inscription “*Dental Office*.”

Held (quashing a conviction) that in putting the plates on his door Emslie had not committed an offence under the Act, in respect that the descriptions did not imply that he was registered under the Act, or that he was a person specially qualified to practise dentistry.

Complaint—Instance—Private Prosecutor—Statutory title to prosecute.—Where a private person has by public statute a title to prosecute summary complaints for statutory offences it is not necessary to set forth in the complaint the statute giving the person his title to prosecute.

On 4th March 1897, Alexander Emslie was charged in the Sheriff Court at Edinburgh on a complaint at the instance of "William Bromfield Paterson, of No. 64, Brook Street, London, "F.R.C.S.E. and L.D.S., Honorary Secretary of the British Dental "Association, with concurrence of Robert Laidlaw Stuart, Procurator-fiscal of Court, for the public interest," which complaint set forth "that Alexander Emslie, residing or carrying on business at No. 1, Rankeillor Street, Edinburgh, has contravened "the 3rd section of the Dentists Act, 1878, in so far as not being "a person registered under the said Act, and not being a legally "qualified medical practitioner, he has taken or used a name title "addition or description implying that he is a person specially "qualified to practise dentistry, by one or more or all of the following "methods viz :—(First) by displaying, or causing to be displayed, "since the month of October 1896, a signboard and brass plate "on the outside of the premises occupied by him at No. 1 Rankeillor "Street aforesaid, with the words 'American Dentistry. A. "Emslie' thereon ; (second) by having, during said period, a brass "plate affixed to the door of said premises with the words 'Dental "Office' thereon ; (third) by using, on or about the 5th day of "November last, a business card or advertisement having the words " 'American Dentistry. Persons desirous of having dental work "done will do well to call at our office, and save at least 50 per cent. "A. Emslie, Manager' printed thereon ; -and (fourth) by exhibiting, or causing to be exhibited, on or about the said date, a "diploma purporting to be granted by 'The Dental Society of New "York, authorised by the State Legislature, and to confer on "Alexander Emslie the degree of "Master in Dental Surgery," "whereby the said Alexander Emslie is liable" etc.

The accused objected (1) to the competency of the complaint in respect that the prosecutor had not set forth a sufficient title to prosecute, and also (2) to the relevancy of all the charges in the complaint.

The Sheriff-substitute (Orphoot) repelled the objections to title, sustained the objection to the relevancy of the third and fourth charges, and *quoad ultra* repelled the objections to the relevancy.

The ground on which the Sheriff-substitute proceeded in sustaining the objection to the relevancy of the third and fourth charges was that the *locus* of these charges was not sufficiently specified.

The accused then pleaded not guilty, but was convicted of the contravention charged by the methods first and second specified, and was fined three guineas.

He obtained a ease. In the ease the facts averred under the first and second charges were set forth as proved.

The following questions of law were, *inter alia*, stated :—
 “ (1) Whether the respondent has set forth a sufficient title to
 “ prosecute ? (2) Whether the complaint is relevant ? ”

Argued for the appellant.—(1) The complaint was bad in respect that it did not set forth the complainer's title to prosecute. Under the Dentists Act, 1878, s. 4, no private person was entitled to prosecute unless with the consent of the General Medical Council. The Medical Act, 1886 (49 & 50 Viet. c. 48), s. 26, repealed that part of the Dentists Act, and gave private persons a title to prosecute ; but the Medical Act was not set forth in the complaint, and consequently the instance was bad. (*Jameson*, for the respondent.—The point is settled by the Summary Proceedure Act, 1864, s. 4). Private persons were *prima facie* not entitled to prosecute, and consequently their title, if they had one, ought to be set forth in the complaint. The concurrence of the procurator-fiscal did not remedy the instance, it was *per se* null. (2) The complaint, in so far as concerned the first and second charges, which alone were now in question, was irrelevant. The Dentists Act, 1878, did not prohibit unregistered persons from practising dentistry ; it only prohibited them from using a title implying that they were registered or specially qualified, and from charging fees. Cases under the Pharmacy Act, 1868, such as *Bremridge v. Hume* (a) were thus in marked contrast, for the purpose of that Act was to prohibit the retail sale of poisons by unqualified persons absolutely. Similarly, in the Veterinary Surgeons Act, 1881, which was under consideration in *The Royal College of Veterinary Surgeons v. Robinson* (b), the statutory prohibition was against an unregistered person using a title implying that he was “ a practitioner of “ veterinary surgery,” or that he was specially qualified ; here the corresponding statutory words were that he was “ registered under “ the Act ” or that he was specially qualified. In short, the purpose of the Dentists Act, as shown by its preamble, was to make provision for the registration of persons specially qualified in dentistry, not to prohibit the practice of dentistry by other persons. Now, the brass plates here with the inscriptions “ American Dentistry. A. Emslie ” and “ Dental Office ” did not in the slightest degree suggest registration under the Dental Act, therefore that branch of the Act was out of the case. Then did these inscriptions imply special qualifications to practise dentistry ? They did not. At the utmost they merely intimated that the house was a place where dental operations were carried

(a) Nov. 2, 1895. 23 Rettie (Just. Cases), 9 ; 2 Adam. 24.

(b) [*Post*, page 333.]

on. They said nothing about the personal qualifications of "A. Emslie"—not even that he was a dental practitioner.

Argued for the respondent.—The first question was as to the title. (LORD JUSTICE-CLERK.—You need not go into that.) Then as to the relevancy of the complaint. The Dentists Act, 1878, was one of those Acts which had been passed for the purpose of enabling the public to distinguish between qualified and unqualified practitioners in particular professions or trades, and the principles of construction applied in *Bremridge v. Hume* (a) and the ease of the *Veterinary College* (b) to such Acts ought to be applied here. The question was whether the appellant had by his acting held himself out as qualified to practise dentistry. The descriptions here libelled were special descriptions of persons professing to practise dentistry. It was true that "Dental Office" and perhaps also "American Dentistry" were descriptions applicable to places rather than to persons; but the *Veterinary College Case* (b) was a complete answer to the argument founded by the appellant on that circumstance, for there the words used by the accused were "Veterinary Forge," and that description was held to be struck at by the Veterinary Surgeons Act, 1881, the language of which was, *mutatis mutandis*, practically identical with the present Act. "American" dentistry certainly implied special qualifications—the qualifications of an American dentist.

At advising—

LORD MONCRIEFF.—The Sheriff-substitute held that the complaint was irrelevant as regards the third and fourth methods therein described, but sustained the relevancy *quoad ultra*, and convicted the appellant of the contravention charged by the methods first and second specified. In my opinion the complaint is also irrelevant in regard to the first and second methods as well as the third and fourth.

The charge is based on the 3rd section of the Dentists Act of 1878. The Act does not prohibit the practice of dentistry or recovery of fees in respect thereof if the patient will pay, but it imposes penalties upon any person who, without being registered under the Act, assumes the title of dentist or any other title, addition, or description implying that he is registered under the Act, or that he is specially qualified to practise dentistry.

The question in this case is whether the method first and second mentioned in the complaint is, in the sense of the 3rd section, a description implying that the appellant is a person specially qualified to practise dentistry.

I agree that the description contemplated by the statute is a description personal to the individual *ejusdem generis* with the

preceeding words, and indicating his special qualifications for the work by training and practice. The terms of the statute are not satisfied by notices exhibited outside a building, which simply state that dentistry is practised therein. The signboard and plate mentioned in the complaint bear the inscriptions, "American Dentistry, A. Emslie," and "Dental Office." They do no more than notify that dentistry is carried on within; they contain no profession of the qualifications of the practitioner, and the plate does not even assert that the appellant is the operator. I think the case would have been precisely the same if the notice had been "Teeth drawn here," which I fancy would not have inspired much confidence in sufferers coming to the place.

I therefore think that, although possibly a relevant case might have been made against the appellant if the complaint had been carefully framed and based on the diploma, the remnant of the complaint upon which the Sheriff convicted is irrelevant, and that the appeal should be sustained.

LORD TRAYNER.—In the complaint (out of which this appeal arises) the appellant is charged with a contravention of the Dentists Act, 1878, in so far as not being a person registered under said Act, and not being a legally qualified medical practitioner, he has, by one or more of the four methods specified by the complainer, taken or used a name, title, addition, or description, implying that he is a person specially qualified to practise dentistry. The Sheriff-substitute has held that with regard to the third and fourth of the methods specified there are no relevant averments, and on a consideration of the evidence led before him has convicted the appellant of the offence charged as having been committed in the methods first and second specified. No objection is stated by the complainer to the decision of the Sheriff-substitute on the relevancy of the methods third and fourth; we are therefore only now concerned with the complaint and conviction in so far as they proceed upon the first and second methods. I am of opinion with regard to them that they are not relevant to infer a contravention of the statute libelled, and that the conviction should be set aside.

It is to be observed that the statute in question nowhere provides that it shall be unlawful for anyone to practise dentistry unless he be a medical practitioner or specially qualified for such practice. It may fairly enough be said that the statute contemplates that such persons will practise dentistry, for in their discouragement it provides that they shall not be entitled to exact fees for any dental operations performed by them. What the statute does prohibit is any person taking or using the name of "dentist" or "dental practitioner," or "any name, title, addition, or description" implying that he is

registered under the Act or specially qualified to practise dentistry. Now, the appellant does not call himself a "dentist" or "dental practitioner." So far it is clear there has been no contravention of the statute on his part. He has exhibited a signboard or brass plate on his premises with the words thereon "American Dentistry. "A. Emslie," and another on the door of his premises bearing the words "Dental Office." These words (I take the two inscriptions together) may no doubt be read as meaning that dental operations are performed in these premises, and performed by the appellant, but they contain nothing to imply that the appellant is registered under the Act or that he is specially qualified to perform these operations. What the statute provided against is anyone using a name or designation which is descriptive of a registered or qualified practitioner, who is not in fact entitled to the designation which the assumed name or description implies. Here the appellant has assumed no title whatever. He does not call himself a dentist, dental practitioner, dental surgeon or licentiate in dental surgery. If he did so he would contravene the statute. But he has added nothing to his own name (which I think is the thing the statute prohibits) by way of title, addition, or description implying that he is registered as a dentist, or that he possesses or claims to have any special qualification for the performance of dental operations. Neither "American Dentistry" nor "Dental Office" can be said to be a name which the appellant has assumed, and neither is a title, addition, or description added to his name implying special qualification for dentistry.

LORD JUSTICE-CLERK.—I agree in the opinions of your Lordships. I will confess that at first I was inclined to take a different view, and if this Act had been broadly directed against the legality of any person not registered practising or professing to practise dentistry I should have had no hesitation in holding that what was alleged and proved here was a contravention. But that is not what the Act bears. As regards that part of the Act on which the prosecutor founds in this case, it strikes only at the holding forth of himself by any person as "specially qualified" to practise dentistry. It does not strike at the practice of dentistry. It recognises that others than persons "specially qualified" may be in the practice of dentistry, and it affects them only to the extent of depriving them of any legal right to sue for remuneration for work done. The question therefore is, whether what is set forth in the two charges which were sent to trial constituted the taking or using of a name, title, addition, or description implying that the appellant was a person specially qualified to practise dentistry. What he did was to place the words "Ameri-

“can Dentistry” on his premises, to place his name in juxtaposition to these words, and further that on the premises occupied by him he had the words “Dental Office.”

I cannot find in these words anything which implies “special” qualification. If the appellant can without any breach of the criminal law extract teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry. The Act strikes at his asserting that he has “special” qualification for doing so, and whatever that may mean, I am unable to hold that the use of the words “American Dentistry” in connection with his name, or calling his place of business a “Dental Office,” can be held to be taking or using a name or title, addition, or description implying that he has a “special” qualification, as distinguished from an assertion that he is qualified.

The Court answered the second question in the negative and sustained the appeal.

BROWN v. WHITLOCK

1903. May 26.

[67 J. P. 451]

Reported also :

19 T. L. R. 524.

Dentist—Person not on register or qualified medical practitioner—Name and qualification of predecessor exhibited outside premises, besides own name—Practice together with name and qualification bought from predecessor’s personal representative—User implying qualifications—Question of fact—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3.

Whitlock, the respondent, who was neither on the Dentists Register, nor a legally qualified medical practitioner, carried on a practice as a dentist at certain premises, where, on the front railings, there was a white marble slab, with the words “Mr. W. Lawson Whitlock, 10-5” upon it. At the side of the front door and at the side door were the words “Mr. C. R. Stent, R.D.S. Eng., Surgeon-Dentist.” In the forecourt was a gas-lamp on which was written “Mr. C. R. Stent, Surgeon-Dentist.” There was a further notice outside the premises “Messrs. Stent, Surgeon-Dentists, established 1840, hours of attendance,” etc. The respondent stated that he purchased the practice from the personal representative of the late

Mr. Stent, together with the right to keep Stent's name and qualifications upon the premises. On an information laid by the appellant for the British Dental Association, a police magistrate decided that the respondent did not, contrary to section 3 of the Dentists Act, 1878, take and use an addition or description "R.D.S. Eng., Surgeon-Dentist," implying that he was then registered under the Act, or that he was specially qualified to practise dentistry.

Held, that the magistrate's decision was a finding of fact, with which the Court could not interfere.

Case stated pursuant to 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, for the opinion of the High Court.

On January 1st, 1903, the respondent appeared on a summons before me at the West London Police Court in answer to an information laid by the appellant for that the respondent on the 10th day of November 1902, at 531, Fulham Road, Walham Green, in the parish of Fulham, in the county of London, and within the metropolitan police district, did, not being then registered under the Dentists Act, 1878, and not being then a legally qualified medical practitioner, unlawfully take and use an addition or description "R. D. S. Eng., Surgeon-Dentist," implying that he then was registered under the said Act, or that he was specially qualified to practise dentistry, contrary to the statute, &c.

At the hearing of the said information before me as aforesaid, the following facts were proved or admitted: (1) That the appellant, as managing clerk to Messrs. Bowman and Curtis-Hayward, solicitors to the British Dental Association, on instructions from the said association, called at 531, Fulham Road, S.W., on November 10th, 1902. (2) The said house is situate at the corner of the Fulham Road and Waterford Road, and the front door is in the Fulham Road. (3) That the house on the said date was a private dwelling-house. On the front railings in Fulham Road was exhibited a white marble slab with "Mr. W. Lawson Whitlock, 10-5," inscribed on it. At the side of the front door facing Fulham Road were the words "Mr. C. R. Stent, R.D.S. Eng., Surgeon-Dentist," on a black marble slab; a gas lamp was fixed on a standard in the forecourt of the said premises on which was "Mr. C. R. Stent, Surgeon-Dentist." At the side of the house in the said road was a brass plate with the words "Messrs. Stent, Surgeon-Dentists, established 1840, "hours of attendance 10 to 6, or by appointment," and on a brass plate on the side door in the said Waterford Road "Mr. C. R. Stent, R.D.S. Eng., Surgeon-Dentist." (4) That the respondent was on the said date carrying on practice as a dentist on the said premises, and was not on the Dentists Register, nor was he a

legally qualified medical practitioner. (5) That the appellant called on the said date at 531, Fulham Road, as aforesaid, and saw the respondent, whom he did not know, and asked him if he was Mr. Stent. The respondent stated that he was not Mr. Stent, and that Mr. Stent had been dead some time, and that he was Mr. Whitlock, and the appellant said that he had called from the solicitors to the British Dental Association with reference to his, the respondent's, carrying on the practice of dentistry under the name of Mr. Stent, whose plates and lamp he had up outside. The respondent replied that he had a perfect right to use the name as he was doing, as he had purchased the practice from the personal representative of Mr. Stent, and the right to keep his (Stent's) name and qualifications upon the premises in the way he was doing. The respondent stated to the appellant that he had come from Australia, and was what might be called a "Quack," but that he could not be stopped from doing what he was doing, and that if he were stopped he would soon get over it by turning himself into a company.

On the foregoing facts it was contended for the appellant that the respondent by exhibiting on the said premises the aforesaid plates, slab and lamp so inscribed as aforesaid used such an addition or description as to bring himself within section 3 of the Dentists Act, and the cases of *The Royal College of Veterinary Surgeons v. Robinson* ([1892] 1 Q. B. 557) [and see *post*, page 333]) and *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857) were referred to in support of this contention. It was contended by the respondent that there was no user within the meaning of the said Act, that the respondent had not taken and used an addition or description, namely, R.D.S. Eng., Surgeon-Dentist, and that the exhibition of the said plates, slab, and lamp inscribed as aforesaid, did not imply that the respondent was registered under the said Act, or that the respondent was a person specially qualified to practise dentistry. It was further contended by the respondent that the facts in this case were different from the facts in the case of *The Royal College of Veterinary Surgeons v. Robinson*, and that the said cases were not an authority on the said Act.

I decided that on the facts aforesaid the respondent did not, contrary to the Dentists Act, 1878, take and use an addition or description "R.D.S. Eng., Surgeon-Dentist," implying that he was then registered under the said Act, or that he was specially qualified to practise dentistry, as alleged, and I therefore dismissed the information.

The question of law, respectfully submitted for the consideration of the High Court, is whether my decision aforesaid was

right in law. If my decision was right, the information is to stand dismissed, if my decision was wrong, the Court is humbly requested to remit this case to me with the opinion of the Court, or to make such other order as the Court may think fit.

Dated this 25th day of February, 1903.

JOHN ROSE.

One of the magistrates of the police courts of the metropolis, sitting at the West London Police Court.

Macmorran, K.C., and *R. W. Turner* for the appellant.—The respondent has brought himself clearly within the terms of section 3 of the Dentists Act, 1878. The fact that his own name was also exhibited is immaterial. The exhibition of the name and qualification of Stent on the premises must have been intended as an implication that the respondent was Stent, and that he was registered (*The Royal College of Veterinary Surgeons v. Robinson*).

Stuart Bevan for the respondent.—The question is one of fact which the magistrate has decided (*Ladd v. Gould* [ante, page 8]). There was substantial evidence on which he could come to that conclusion.

LORD ALVERSTONE, L.C.J.—I regret that I feel bound to give judgment for the respondent, and that we cannot interfere with the magistrate's decision. I am inclined to think that these names and appellations were kept up, in order that the respondent might identify himself with Stent, and to induce people to think that he was a registered dental surgeon. A considerable number of the poor people, who would go to such a place as the respondent's, would not make any inquiry as to what the respondent's name was. I am afraid we cannot deal with the case upon that basis as the summons here was worded "For that he did, not being then registered, unlawfully take "and use an addition or description, namely, 'R.D.S. England, "Surgeon-Dentist,' implying that he was specially qualified to "practise dentistry contrary to the form of the statute." The learned magistrate thought that these names, used as they were under the circumstances described, indicated that a dentistry business was carried on there at these premises by one Stent, and he did not believe that the words did or could reasonably imply that the respondent was registered or specially qualified. The question seems to me, apart from the decision in *Ladd v. Gould*, to be a question of fact. Whether I should have come to the same conclusion upon the facts or not, is beside the question. It is impossible for me to say that the magistrate has come to a wrong conclusion in deciding that the name or description so

used was not a name or description implying that the respondent was a qualified dental practitioner. Mr. *Macmorran* said it would make no difference if the name was left up or not. That seems to me to go too far. I cannot help thinking that if nothing was said, and if there was evidence that the respondent was passing himself off as the Stent of the present time, then it would be using not only the name and description, but the name of Stent with the description. But the magistrate has found as a matter of fact that the name of Whitlock was *bona fide* put up, that there was no fraud, and that the respondent was not passing himself off as Stent, but indicated that he was Whitlock, and not Stent. With reluctance I come to the conclusion that we cannot interfere with the magistrate's decision, and I regret that the practice, which is open to no objection and which would have rendered this case unnecessary, was not followed of indicating the fact that a business is not carried on by a former proprietor by the prefix of the word "late" to his name.

WILLS, J.—I am of the same opinion. I cannot say I should myself have arrived at the same conclusion as that of the learned magistrate. There is very little doubt that these various descriptions were left up with the intention that the respondent should be connected either with Stent, the surgeon-dentist, or with one of the Stents—one of the firm described as Messrs. Stent. It is purely a question of fact, and we cannot interfere.

CHANNELL, J.—I agree. But I also think that the respondent did not use the words in question as a description of himself. I think the use was rather an improper use: it was an attempt to bring people to the premises under the idea, that there was a qualified person practising there, when in fact there was not, and on arriving there they were attended to by the respondent. But I do not think the respondent used these words in the particular way forbidden by section 3 of the Act, namely as a description of himself.

Appeal dismissed.

O'DUFFY *v.* JAFFE

1903. Nov. 20.

[37 I. L. T. 236]

Reported also :

[1904] 2 I. R. 27 ; 4 N. I. J. R. 39.

See also Minutes of General Medical Council :

Vol. XLI. (1904) 6, 7, 42, 43, 87, 96, 194, 195, and
App. IX. pp. 381, &c., App. XXIII. p. 698.*Dentists Act, 1878 (41 & 42 Vict. c. 33)—Person—Company.**A company was summoned under 41 & 42 Vict. c. 33, s. 3, for having used the designation "Surgeon Dentists," not being duly registered under the Act as such :**Held, that they could not be convicted, as the word "person" in such section only applied to natural persons and did not include a corporation or a company.*

Case stated by the Justices of Limerick. The complainant was Kevin E. O'Duffy and the defendants were Jaffe, Surgeon Dentists, Limited. The defendants were summoned for having "used the name, title, addition, or description of Dentist and "Surgeon Dentist, and the title or description of the London & "New York Dental Institute, implying that the defendant company was specially qualified to practise dentistry, the said defendant company not being duly qualified in that behalf according to "law, or entitled to use the names, titles, additions, or descriptions "aforesaid." The defendant company was a registered company under the Companies Acts, 1862 to 1900. The offices of the company were in Cecil-street, Limerick, having over the door the inscription "Jaffe, Surgeon Dentist, Limited," and on a brass plate on the right hand side of the door was "London "and New York Dental Institute, conducted under the supervision "of Messrs. Jaffe, Surgeon Dentist, Ltd." Neither the company nor its directors were registered in accordance with section 3 of the Dentists Act, 1878 (41 & 42 Vict. c. 33). It was contended on behalf of the defendants that the word "person" in section 3 only applied to an individual and not to a corporation or company. The complainant relied on the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 2, sub-s. 1, which declares that "person" shall

include a body corporate, unless the contrary intention appears. The Justices held that such contrary intention did appear in the Dentists Act, 1878, and that the said Act only applied to a natural person, and dismissed the complaint with £1 costs on the merits.

Healy, K.C., and *Charles Doyle* appeared for the defendants.

Ronan, K.C., *Samuels, K.C.*, and *G. FitzGibbon* appeared for the prosecutor.

Cases cited: *The Pharmaceutical Society v. London & Provincial Supply Association*, 5 App. Cas. 857; *Brown v. Whitlock* [*ante*, page 223]; *Ladd v. Gould* [*ante*, page 8].

LORD O'BRIEN, C.J.—The question is—Does “person” in this Act deal exclusively with natural persons, or does it include corporations or companies? I am of opinion that “person” is confined to natural persons for the following reasons: Section 3 enacts that “a person shall not be entitled to take or use the ‘name or title of ‘dentist’ (either alone or in combination with any ‘other word or words), or of ‘dental practitioner,’ or any name, ‘title, addition, or description, implying that he is registered under ‘this Act, or that he is a person specially qualified to practise ‘dentistry unless he is registered under this Act’”; and that section goes on to enact that any person violating the section shall be liable on summary conviction to a penalty not exceeding £20. That most plainly, in my opinion, deals with a person who could be registered—namely, a natural person. There is no procedure for the registration of a corporation or a company, and “specially qualified” are appositely applied to a natural person, and wholly inapposite to a corporation or company. Only those persons are liable for non-registration who could be registered under the Act. Who then can be registered under the Act? Section 6 will afford the answer. Firstly, any person who is a licentiate in dental surgery or dentistry of any of the medical authorities. It is plain that “licentiate” does not include corporation or company. Secondly, any one entitled to be registered as a foreign dentist. Sections 8 and 9 provide that these must be of good character. Thirdly, any one who at the passing of the Act was *bona fide* engaged in the practice of dentistry. That clearly means an actual practitioner, a natural person. It is therefore quite plain that a corporation could not be registered, and a person who could not be registered was not intended to be liable to be prosecuted. Taking section 3 by itself, it is plain that “person” is confined to natural person; but if you take all the sections it becomes still more plain. (His Lordship here cited from the judgment of Lord Blackburn in *Pharmaceutical*

Society v. London and Provincial Supply Association, p. 871.) With reference to the Interpretation Act, the words in it are "unless the contrary intention appears," and hence it does not affect the construction in this case. There is plainly a contrary intention implied in the Act. Take some of the other sections. All the provisions for putting a person on the register and taking him off are confined to natural persons. Section 13 enacts that a name may be erased from the register if the person is guilty of a felony or misdemeanour, or of any infamous or disgraceful conduct. This cannot refer to a company. Section 18 provides for examination, and that the person must have attained 21 years of age. Again, section 35 provides that a person who obtains registration by any false representation shall be liable to be imprisoned for any term not exceeding twelve months. Now, you cannot imprison a corporation or company. Mr. *Ronan* says that the object of the statute will on this construction be frustrated; but what is the object of the statute? It is that a person who is not registered, but could be registered, is to be liable to prosecution if he assumes a designation to which he is not entitled under the Act. This object is by no means frustrated, and has a very wide application. I refer in conclusion to an observation by Lord Watson in *Pharmaceutical Society v. London and Provincial Supply Association*, p. 874. "It is not enough for me to speculate as to what was in the mind of the framer of this statute, whether he had forgotten the fact that there were corporations which either were dealing, or might deal, in poisonous drugs: or whether, having this in view, he framed the Act for the purpose of subjecting them to certain disabilities. I can only look at the language which the Legislature has employed . . . and even if I was satisfied that it had been the intention of the framer to give to individuals registered under the Act, the exclusive privilege of selling poisonous drugs by retail, and to impose penalties on corporations keeping open shop for that purpose . . . the framer of the Act, if that was his intention, has entirely failed to use language adequate for the purpose he intended to attain." So it is in this case.

GIBSON and MADDEN, JJ., concurred.

REX v. REGISTRAR OF JOINT STOCK COMPANIES FOR IRELAND (ROWELL'S CASE)

1904. April 20.

[38 I. L. T. 137]

Reported also :

[1904] 2 I. R. 634.

See also Minutes of General Medical Council :

Vol. XLI. (1904) 6, 7, 43, 87, 88, 96, 195, 200, 201, and App. X. pp. 395, &c.

The Companies Acts—Dentists Act—Mandamus—Refusal to register company—Lawful purpose—25 & 26 Viet. c. 89, s. 6—41 & 42 Viet. c. 33.

The Registrar of Joint Stock Companies declined to register, under the title "S. G. Rowell, Dentist, Limited," a company consisting of R., who described himself as a "mechanical dentist," and A., B., C., D., &c., none of whom were dentists. On application to the King's Bench Division for the issue of the prerogative writ of mandamus, commanding the Registrar to register the said company :

Held, the prerogative writ of mandamus will not be granted to assist a fraud.

The Dentists Act implies a statutory definition of the word dentist as "Dentist registered under the Dentists Act."

The title of the proposed company involved false representations and a fraud on the public, and therefore a mandamus could not be granted.

Application to make absolute a conditional order that the writ of *mandamus* do issue directed to the Registrar of Joint Stock Companies for Ireland, commanding him to register the memorandum of association of the company, limited by shares, entitled "S. G. Rowell, Dentist, Limited," and to issue a certificate under his hand that such company is incorporated and limited."

The memorandum of association and the application for a certificate were signed as follows:—"Sidney George Rowell, "mechanical dentist; Bridget Rowell, married woman; Thomas "J. Roche, drapery manager; Albert G. Webster, photographer; "William Tuohy, merchant; William O'Keeffe, drapery manager;

“John M'Master, creamery manager.” In his affidavit, grounding the application, S. G. Rowell described himself as a “Mechanical “Dentist,” and said that he had served an apprenticeship of seven years to a “Surgeon Dentist” in London; that he had for the past three years “carried on the business of dentist” at Clonmel; that he had decided to convert his said business into a limited company; that all the requisitions of the Companies Acts had been complied with; and in a further affidavit, that he “converted his said business into a limited company, *bona fide*, for “the more effectual carrying on of the said business, and because “he believed that his said business could be more effectively and “profitably carried on as a company, and not for any other reason “or purpose.” The Registrar of Joint Stock Companies, acting under general directions as to Dentist Companies received from the Board of Trade, did not register the company, stating that the Board were considering the matter. Cause was shown by Nevin E. O'Duffy, Hon. Secretary of the Irish Branch of the British Dental Association, on behalf of that Association. In his affidavit he said that the application was resisted on the ground that it was made for the fraudulent purpose of evading the provisions of the Dentists Act, 1878 (41 & 42 Vict. c. 33), and enabling S. G. Rowell, who was not, and never had been, registered under the Dentists Act, and was not entitled to be so registered, to take and use under the cover of the name of “S. G. “Rowell, Dentist, Limited,” the name, title, and description of dentist, and thus to impose upon the public and to invade the privileges of properly qualified and registered dentists, and by turning himself into a one man company to escape the liability to prosecution and the penalties which would be inflicted on him if he were to take or use the name of “dentist” as an individual; that as to the assumption of the title, addition, or description of “Mechanical Dentist,” it was illegal and misleading, and rendered him liable to prosecution under the Dentists Act, 1878, and the assumption of the said title of dentist, either alone or in combination with any other word or words, such as “mechanical,” was in direct contravention of section 3 of the said Act, inasmuch as S. G. Rowell was not a registered dentist under that Act; that the seven signatories of the memorandum were not associated together for any lawful purpose under the provisions of section 6 of the Companies Act of 1862, but that they had conspired together for an improper and inequitable and fraudulent purpose—viz., to enable the said S. G. Rowell to evade the provisions of the Dentists Act, and to masquerade as a qualified dentist under cover of the said name; that the objects of S. G. Rowell were *mala fide*.

Ignatius O'Brien, K.C., and *Michael Dunne*, for the applicant,
S. G. Rowell.

Samuels, K.C., and *Gerald FitzGibbon*, for the Irish Branch of
the British Dental Association.

Coll, for the Board of Trade.

Authorities cited.—*Reg. v. Tyler*, [1891] 2 Q. B. 588 ; *Reg. v. Garland*, L. R. 5 Q. B. 269, 272 ; *Hendricks v. Montagu*, 17 Ch. D. 638 ; *Reg. v. Registrar of Joint Stock Companies*, 21 Q. B. D. 131 ; *Reg. v. Littledale*, 10 L. R. Ir. 86, and 12 L. R. Ir. 97 ; *Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513 ; *O'Duffy v. Jaffe* [*ante*, page 228] ; *Salomon v. Salomon*, [1897] A. C. 22, 55.

Cur. adv. vult.

PALLES, L.C.B.—We are asked to direct an issue of the prerogative writ of *mandamus* to direct the Registrar of Joint Stock Companies for Ireland to register the memorandum of association of the company limited by shares entitled “S. G. Rowell, Dentist, Limited,” and to issue a certificate under his hand that such company is incorporated and limited. And first I must put out of consideration the offer to amend the title of the company. That offer cannot be considered on the present application, for an application for the prerogative writ of *mandamus* cannot be successful unless there has been a demand and a refusal, and the demand here has been to register the company under a particular title. The argument in support of the application may be stated in one word ; it was that the right to have the company registered followed as a corollary from the decision in *O'Duffy v. Jaffe* in this Court, and we cannot, of course, reconsider that case. On the other hand it was argued that the use of the name “S. G. Rowell, Dentist, Limited,” involves a false representation, and that that was not a lawful purpose within the Companies Act of 1862, s. 6. Now I assume that the word “person” in the second paragraph of section 3 of the Dentists Act, 1878, is limited to natural person, and that the word “person” in the first paragraph of that section is also similarly limited to natural person. This section provides for a criminal prosecution, but a prosecution only in respect of the use of the name or title of dentist, either alone or in combination with any other word or words, or any title implying that he is registered under this Act unless he is registered under it, and such use plainly must be through the agency of a natural person. My view is that the use of these words (by a natural person) are by reason of their untruthful inference prohibited from being taken or used, and the breach of that provision is made a criminal offence. The essence of the criminal offence is the untruth of the statement, the

falsehood of it. I think the construction of the section involves a statutory definition of the word "Dentist," and that it means a "Dentist registered under the Dentists Act." If the name "S. G. Rowell, Dentist, Limited," refers to S. G. Rowell personally, that is a false statement; and if it refers to the company, it is equally a false statement, for a company cannot be a "Dentist registered under the Dentists Act." This company is seeking to be registered under circumstances, every one of which involves a false statement, a representation that there are here registered dentists, and, as the prerogative writ cannot be granted to assist a fraud, the application must be refused with costs. I do not express any opinion on *O'Duffy v. Jaffe*, which I am bound to follow.

ANDREWS and JOHNSON, JJ., concurred.

HENNAN AND CO. LIMITED v. DUCKWORTH

1904. April 18.

[90 L. T. 546]

Reported also :

20 T. L. R. 436.

Dentistry—Unregistered person—Supply of false teeth—Fitting set in patient's mouth—Right to recover fee—"Dental operation, "dental attendance or advice"—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 5.

A person who was carrying on the practice of a dentist, but who was not registered under the Dentists Act, 1878, made for the defendant and fitted to the defendant's mouth a set of false teeth which were taken by the defendant and kept and used by him. The defendant having refused to pay for the same :

Held, that section 5 of the Dentists Act, 1878, which prevented an unregistered person from recovering any fee or charge for "the "performance of any dental operation, or for any dental attendance "or advice," did not prevent the unregistered person from recovering the price of the set of teeth so supplied, as distinguished from the fitting of the same.

Appeal by the defendant from the County Court of Lancashire, held at Blackburn.

The plaintiffs, J. B. Hennan and Co. Limited, were a registered company with a registered office at Blackburn, who carried on the practice of dentists by means of unregistered managers who were not duly qualified to act as dentists under the Dentists Act 1878, and they brought the present action to recover the sum of £5, the price agreed to be paid by the defendant for a set of artificial teeth and fillings.

The particulars of the plaintiffs' claim were as follows :

To upper and lower sets of artificial teeth and fillings, £5.

John B. Hennan said that he was the managing director of the plaintiff company, that he was not on the register, but that he was apprenticed to a dentist for seven years ; that the defendant called on him on the 23rd of April last, when he (the defendant) was wearing a set of teeth with which he was not satisfied ; and the witness said that he would make a set of teeth and do some filling for £5 ; that the defendant visited him four times, and that on the 27th of April the set was fitted in ; that a Mr. Aynley fitted them in ; that he (the defendant) took them away, and that he had a conversation with the defendant about not being qualified ; that the defendant came and complained, and the witness offered to remedy the set.

Mr. Aynley said that the price was fixed for the teeth ; that he fitted them in the defendant's mouth about the 27th of April ; and that the teeth were in his opinion a good fit ; that the day before the action was entered he offered to alter them, but that the defendant said he could not spare them.

The defendant said that the set was bad ; when he had worn them a week he went and complained, and he saw Mr. Hennan, who did something to them and told him to keep them in for some weeks ; he again saw Mr. Hennan in August and said they were wrong, and that he would come in and see him at a later time ; he went in September, when Mr. Hennan wanted them for the purpose of altering them, but the defendant could not spare them then. Ultimately this action was brought.

For the defendant it was objected that the plaintiffs could not recover on the ground that the action was brought to recover fees or charges for the performance of a dental operation or for dental attendance or advice, and came within the provisions of section 5 of the Dentists Act, 1878.

The learned County Court Judge held that the claim, so far as it was for making the set of teeth, as distinguished from the fitting of the same and the fillings, was not within the Act, and he assessed the amount to be recovered in respect of such making at the sum of £4 4s. for which amount he gave

judgment, with leave to appeal, as he considered the matter of public interest.

The defendant appealed upon the grounds that the judge was wrong in law in not holding that the Dentists Act, 1878, s. 5, was a defence to the action, and in not entering judgment for the defendant or non-suiting the plaintiffs; and that there was no evidence on which the judge could arrive at the decision he did.

R. W. Turner for the defendant.—(Lord ALVERSTONE, C.J.—The defendant kept the teeth, and for the purpose of the present case we must assume that he kept them.) Yes; the learned Judge gave judgment for the whole amount, less 16s., which he assessed as the costs of the fillings and the fitting. He was wrong in allowing the plaintiffs to recover any part of the claim. The point is whether under the Dentists Act the plaintiffs can charge for the bare cost of the materials, in which case there ought to have been some evidence offered as to the cost of the materials. If a person went into a dentist's shop and simply bought a set of artificial teeth, without any attendance or advice being given, then that would be a case of goods sold and delivered, and the Act would not apply to prevent the person from recovering the price. That case is totally different from the present. With regard to a person who does dental work and carries on a dental practice, it is not the value of the materials supplied for which the charge is made; the materials are merely incidental to the work, which is the skilled work of a dentist. (Lord ALVERSTONE, C.J.—The Judge has not given anything for “dental attendance” or “dental advice”; he has not allowed the plaintiffs anything for fitting nor for the fillings; and we must take it that what he has given is the cost of making a frame and teeth, and that he has assessed, whether rightly or wrongly, £4 4s. for the gold and the teeth.) Yes, for the cost of the materials. What a dentist charges for is his dental skill in preparing the teeth for the plate, in taking the impression, and in actually fitting the teeth to the mouth; but the section does not mean to hit persons who merely make frames and who make teeth which are sold to dentists. The fitting in of the gold and the teeth on the frame is a dental operation, and it is dental advice, and the giving of the teeth is merely ancillary to the advice, and therefore not recoverable. The Judge had no power to split the claim, and assess so much for goods sold and delivered, and so much for dental operations. The real claim here is a claim for work done as a dentist, for dental advice, attendance, and for a dental operation, and that is the very thing the section was intended to prevent; and to allow an unregistered person to bring an action for the materials supplied in such a case would be to encourage

a class of actions which it was the object of the statute to prevent. There is no hardship in not allowing such persons to recover for the materials supplied, as they can protect themselves by requiring payment before they part with the materials. There is a corresponding section (section 32) in the Medical Act, 1858, which provides that no unregistered person shall be entitled to recover any charge "for any medical or surgical advice, attendance, or "for the performance of any operation." Under that section an unregistered person who had performed a surgical operation could not recover a charge for the sutures or other things, such as splints or tubes, which he had used. The reason why the Legislature in that section added the words "or for any medicine which "he shall have both prescribed and supplied" was that at that time there was the Pharmaceutical Society of Chemists, a body which supplied medicines. They may not prescribe them, but they may supply them. The section is a defence to the whole claim.

J. R. Randolph for the plaintiffs.—The learned Judge took a proper view of the section. It is admitted for the purpose of this argument that the figures are correct; and, assuming them to be correct, the Judge disallowed everything for fitting these teeth and so on, and he only gave the plaintiffs judgment for the balance for that which they could supply. The supply of a set of false teeth is really goods sold and delivered, and not work and labour done. In the case of *Lee v. Griffin* (4 L. T. Rep. 546; 1 B. & S. 272) a person who had ordered a set of false teeth died before they were delivered, and there being no memorandum under the Statute of Frauds, her representative would not pay for them. The point turned on the question whether the dentist was right in suing for goods sold and delivered, in which case he was beaten by the Statute of Frauds, or whether he was right in suing for work and labour done, in which case the statute would not apply; and the Court held that it was goods sold and delivered. The Court there drew the distinction between the two causes of action for goods sold and delivered and for work and labour done, and they came to the conclusion that a set of teeth, to be made for the person and fitted to the mouth and then paid for, was goods sold and delivered. That is a decision to show that the sale of a set of false teeth to be fitted to the mouth of the patient is the sale of a chattel. (He was stopped.)

LORD ALVERSTONE, C.J.—I must say that I have a strong feeling that it would be very desirable that the Dentists Act of 1878 should be amended, if it is thought by persons who are acquainted with dental matters that it is desirable that only

registered and qualified persons should supply false teeth to go into persons' mouths. I can well imagine that although, in one sense, it is quite a different thing to perform an operation on the teeth, the mouth, the gums, or the jaw, yet at the same time it may be an extremely uncomfortable and unsuitable thing, and I daresay, perhaps in rare cases, a dangerous thing to have improperly fitted teeth; but, I think that, taking the language of section 5 of the Dentists Act 1878, it does not go far enough to include such a case as this, and we must take it that, at any rate in 1878, the common use of false teeth was perfectly well known. The language used in section 5 is that the unregistered person shall not be entitled to recover any fee or charge "for the performance of any dental operation, or for any dental attendance or advice." In my opinion, *prima facie* certainly, the words in that section "dental operation" mean operation upon the person—on the mouth of the patient; "dental attendance" would mean advising in respect of the condition of the mouth, or as to what should be done, and "advice" would, of course, mean something of the same character. If it had been intended by the Legislature that the section should go on and say: "And nothing supplied by the dentist in pursuance or in consequence of such advice shall be charged for"; I think we should expect to find those words there. And I myself am a little pressed by the fact that, in the corresponding section in the Medical Act, which was passed in 1858, the Legislature did add the words: "For any medicine which he shall have both prescribed and supplied"; whereas in the Dentists Act they did not add: "For any teeth prescribed or supplied." The reason given by counsel for the appellant—namely, that those words were inserted in the Medical Act because chemists then existed who supplied medicines without prescribing—does not seem to me quite a sufficient answer. This Act, being an Act which prevents an unregistered person from being entitled to recover charges and fees, must be construed strictly; and while I should be glad if it should be thought desirable that the Act should be amended in the direction I have indicated, it would, in my opinion, be going too far to hold that the learned judge, who has expressly excluded any charge for fitting and advice and so on, was wrong in the view he took. Whether he has given the plaintiffs too much is a point we cannot deal with. He has assessed the amount recoverable on a right principle, unless the Act makes the supply of the false teeth part of the "dental operation," the "dental attendance" or "advice," which I do not think it does. I was for the moment pressed by counsel's suggestion that the non-registered person could protect himself by requiring payment beforehand, and by saying "You shall not

“take the thing away until you have paid your money for it”; but we have here to deal with a statute which prevents a person from having the ordinary rights of being paid for articles which he has supplied, and I think that the language of the section is not sufficient to bring such a case as the present within its terms. We must hold, therefore, that the County Court Judge was right, and that this appeal must be dismissed.

WILLS, J.—I come, with some reluctance, to the same conclusion. I say “with some reluctance,” because, probably, there is no part of a dentist’s work which requires more care and very often more skill than the preparation and the manufacture of false teeth, and it might very well have been that the words would have covered such a case as this. But I do not think that it is possible to say that making the teeth can come under “dental attendance or advice.” Therefore we are really driven to the question whether the words “dental operation” are sufficiently large to include such work as this. It seems to me that a dental operation—an operation in respect of the teeth—really means an operation in a surgical sense, something that is to be done, not upon the false teeth, but upon the living person, and that what really is charged for here is that which was not done upon the person, but was done upon the incomplete set of false teeth, in order to make them fit the person; and I do not think that “dental operation” can reasonably be construed to cover such a state of things as that.

KENNEDY, J.—I concur, and have nothing to add.

Appeal dismissed.

PANHANS v. BROWN

1904. May 13.

[68 J. P. 435]

See also Minutes of General Medical Council :

Vol. XL. (1903) 144, 145, 310 to 312, 320 to 324.

Dentist—Unregistered person using title of—One man company—The Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3.

The appellant, not being a registered person under the Dentists Act, 1878, or a legally qualified medical practitioner, was summoned for using an additional title, “German Dental Institute, “West Central Dental Institute, Limited,” implying that he was

registered under the said Act or was specially qualified to practise dentistry.

Held, that he was rightly convicted.

Case stated by a metropolitan police magistrate.

Three informations were laid against the appellant under the Dentists Act, 1878. Under the first information the appellant was summoned for that he, not being a legally qualified medical practitioner, did unlawfully take or use an addition or description, namely, "German Dental Institute, West Central Dental Institute, Limited, 60, Gower Street, Bedford Square, W.C. Consultations from 10 to 6. Sundays, from 10 to 2. Fixed prices. Artificial teeth from 5s. upwards; gold stoppings from as low as 10s. 6d. and upwards; platina stoppings from 7s. 6d. upwards; silver stoppings only 5s.; best cement stoppings only 3s. 6d.; cleaning teeth from 2s. 6d. upwards. Complete sets in gold, platina, and also crown and bridge work at most moderate prices. Only absolutely good and durable, under guarantee. All the most recent improvements in connection with dentistry. Painless treatment in stopping and extraction of teeth. The same treatment for all, no preference whatever shown," implying that he was registered under the said Act, or that he was specially qualified to practise dentistry. The two other informations were laid by the respondent under the same Act against the appellant for that he on November 24th, 1903, and November 26th, 1903, respectively, at 60, Gower Street, did, not being then registered under the Dentists Act, 1878, and not being then a legally qualified medical practitioner, unlawfully take and use an addition or description, namely, "West Central Dental Institute, Limited," implying that he was registered under the said Act, or that he was specially qualified to practise dentistry, contrary to the form of the statute in that case made and provided. The informations were heard on December 16th, 1903, and on January 8th, 1904, the learned magistrate convicted the appellant on all three informations.

At the hearing the following facts were proved or admitted: "The West Central Dental Institute, Limited," was duly registered as a joint stock company on January 5th, 1903, and the appellant was the sole director and manager thereof. The registered address of the company was 60, Gower Street, and on the door-plate of such premises were the words "West Central Dental Institute, Limited, Zahnärztliches Institut," but the name of the appellant did not appear either on the door-plate or elsewhere on the premises. The appellant was not a specially qualified person within the meaning of the Dentists Act, 1878,

as amended by the Medical Act, 1886, or registered thereunder. The appellant formed the company because he was not a specially qualified person within the meaning of the above Act. The object of the Company purported to be to carry on the practice and promote the adoption of advanced and scientific methods of dental surgery, to undertake tuition in the methods of dental practice and to participate in the profits arising from the practice of dentistry by duly qualified practitioners, and to secure their services and acquire businesses for that purpose. After the formation of the company the appellant continued to practise dentistry at the said premises. There was no evidence that any specially qualified person within the meaning of the Dentists Act, 1878, as amended by the Medical Act, or registered thereunder practised dentistry at the premises. The receipts for money paid by patients were in the name of "The West Central Dental Institute, Limited," and initialled by the appellant "J. P., Managing Director."

On the hearing of the first of the above informations the following additional facts were proved or admitted: That an advertisement had been inserted by the authority of the appellant in the "London General Anzeiger," a German newspaper, published and having a circulation in London. The advertisement was to the same effect as the description already set out. That on the day in question to wit, on November 18th, a witness, one Charles Bryan, in consequence of the said advertisement, called at the said premises and saw the appellant, but upon the appellant informing him in answer to express inquiries that he was not a person qualified to practise dentistry in this country, no dental operation was performed, and the witness left the premises though the appellant was ready and willing to perform such an operation.

On the hearing of the second and the third of the above informations it was proved or admitted, in addition to the aforesaid facts, that in consequence of the descriptive words appearing on the door-plate, to wit, the words "Dental Institute, Limited, West Central Registered Zahnärztliches Institut," a witness, one A. N. Robinson, called on November 24th and 26th, at the said premises and dental operations were performed upon him on each of those days by the appellant.

On the part of the respondent it was contended: That the appellant was taking and using a name title addition or description implying that he John Panhans was registered under that Act, or was a person specially qualified to practise dentistry.

On the part of the appellant it was contended: (1) That the appellant had not taken any title either of dentist or dental

praetitioner or any word or description whatsoever implying that he was specially qualified to practise dentistry or that he was registered under the Dentists Act, 1878, but that if any such word or description had been taken it had been taken by the company. (2) That the words “ West Central Dental Institute, Limited,” did not imply that the appellant was a person specially qualified to practise dentistry or that he was registered under the said Act. (3) That the appellant and the company were two distinct entities, and that the acts of one could not be identified as the acts of the other, nor could the title of a joint stock company be the description of a person. My attention was called to the several reported cases hereinafter set out, *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857, 45 J. P. 20 ; *Royal College of Veterinary Surgeons v. Robinson*, [1892] 1 Q. B. 557 ; 56 J. P. 313. [See note, *post*, page 333.] The magistrate came to the conclusion that the description on the door-plate and in the advertisement implied that the person who in fact practised dentistry at 60, Gower Street, was a person specially qualified under the Dentists Act, 1878, as amended by the Medical Act, 1886, or registered thereunder, and that such was the impression which would be left on the mind of any ordinary person reading the advertisement or the words on the door-plate. He was of opinion that the appellant being the only person who actually practised dentistry on those premises, did avail himself of, and use the description on the door-plate and the description in the advertisement implying that he was a person specially qualified under the Dentists Act, 1878, as amended by the Medical Act, 1886, or registered thereunder, and he convicted the appellant on each of the three informations.

H. Ivory, K.C. (with him *H. Brandon*), for the appellant.—There ought to have been no conviction in this case. The appellant has not himself taken the title of “ dentist ” or “ dental ” “ praetitioner ” or any word or description implying he is specially qualified. The company, the “ West Central Dental Institute, Limited,” is quite a distinct entity from the appellant. In the case of the *Royal College of Veterinary Surgeons v. Robinson*, the use of the word “ veterinary ” implies a qualification ; that is not so with a dental institute. There is no statute to prevent a man practising as a dentist provided he does not hold himself out as a “ dentist ” or a person specially qualified to practise dentistry. The mere performance of dental operations is not a breach of the law.

R. W. Turner, for the respondent, was not called on.

LORD ALVERSTONE, C.J.—The appellant in this case himself

inserts the advertisement. He does not put his own name, but he calls himself the "German Dental Institute, 60, Gower Street," and states when consultations may be had and gives a number of descriptions which, if they applied to an individual, would unquestionably be sufficient to indicate or to imply that he was a person specially qualified to practise dentistry. But Mr. *Avory* contends that because there is also on the notice "West Central Dental Institute, Limited," and because no name is mentioned, it is not the same thing as if he simply put up "dentist" on the door and that he does not come within the Act. I am clearly of opinion that the magistrate has come to the only conclusion that he could come to, and that there is abundant description to infringe the Dentists Act, 1878.

WILLS, J.—I agree.

KENNEDY, J.—I agree.

Appeal dismissed.

SEYMOUR v. PICKETT

1905. Feb. 25.

[74 L. J. (K. B.) 413]

Reported also :

[1905] 1 K. B. 715 ; 92 L. T. 579 ; 21 T. L. R. 302.

Contract — Consideration — Appropriation of Payments — Dentists Act, 1878 (41 & 42 Viet. c. 33), s. 5.

The Dentists Act, 1878, s. 5, prevents an unqualified person from recovering any fee or charge for dental operations or dental attendance or advice, but there is nothing in the Act which renders the contract to do such work illegal, and notwithstanding section 5 an unqualified person can recover in respect of mechanical work done or materials supplied in the course of such dental operations or attendance.

Where, therefore, money has been paid to the unqualified person on general account of services partly within and partly without the scope of section 5, he may appropriate it to the payment of the fees and charges which he could not recover under that section, and maintain an action for the balance which is not within the scope of section 5.

Where the debtor makes no appropriation at the time of payment the creditor has the right to appropriate up to the very last moment, and may exercise his right in the witness-box after action brought,

provided that there has been no proceeding in the action amounting to a previous exercise or determination of his right, and that nothing else has happened to prevent him from so doing.

The *Meece* (66 L. J. (P.) 86 ; [1897] A.C. 286) *followed and applied* ; and *Friend, In re* ; *Friend v. Friend* (66 L. J. Ch. 737 ; *sub nom. Friend v. Young*, [1897] 2 Ch. 421), and *Smith v. Betty* (72 L. J. K. B. 853 ; [1903] 2 K. B. 317) *distinguished*.

Appeal by the plaintiff against two decisions of the Divisional Court (Lord ALVERSTONE, C.J., KENNEDY, J., and RIDLEY, J.).

The plaintiff, being at the time an unregistered dentist, agreed to do certain work to the defendant's teeth for £45. On July 8, 1903, immediately on the completion of the work, the defendant gave to the plaintiff two cheques, one of that date for £20, and another, post-dated August 8, 1903, for £25 ; and the plaintiff gave to the defendant a formal receipt. The cheque for £20 was duly honoured, but the defendant stopped payment of the £25 cheque. This action was originally brought in the King's Bench Division on the cheque for £25, and was remitted to the County Court. The defendant gave notice to the plaintiff that he intended to rely on the provisions of the Dentists Act, 1878.

The County Court Judge gave judgment for the plaintiff for the amount of the cheque, but on appeal the Divisional Court held that there was no good consideration for the cheque so far as it related to fees or charges within section 5 ; but the Court also held that, according to the decision in *Hennan & Co. v. Duckworth* [*ante*, page 234], the plaintiff was entitled to recover in respect of matters not within the section, such as mechanical work done and gold or other materials supplied, and remitted the case to the County Court Judge for re-trial, directing that he should ascertain how much the plaintiff was entitled to recover for matters not within the section. At the second trial, in answer to a question of his own counsel, the plaintiff in the witness-box claimed to appropriate the £20 cheque to fees and charges within the operation of section 5, and the £25 cheque to matters outside the operation of section 5. The County Court Judge held that the £25 cheque was treated as payment by the parties, and that there was good consideration for it ; but if he was wrong in this view, he assessed the claim for matters outside the operation of section 5 at £21, and held that the plaintiff had appropriated the £25 cheque to this claim. If there was no appropriation, then the plaintiff was only entitled to recover £1. On a second appeal the Divisional Court held—first, that there was no evidence that the £25 cheque was given as payment ; and secondly, that there was no valid appropriation ; and accordingly gave judg-

ment for the plaintiff for £1 only, and gave the defendant the costs of the appeal.

The plaintiff now appealed to the Court of Appeal against both decisions of the Divisional Court, having obtained special leave from the Court of Appeal to appeal against the first decision.

Harold Morris, for the appellant.—On the second appeal from the County Court the Divisional Court considered that the question whether there was consideration for the £25 cheque was really concluded against the plaintiff by their decision on the first appeal. However that may be, the question is certainly open on the present appeal, which is from both judgments of the Divisional Court. There is nothing in the Dentists Act, 1878, which made the work or consideration illegal, and the work was sufficient consideration to support an action on the second cheque, even though the implied promise to pay, apart from the cheque, was unenforceable under section 5—*Chitty on Contracts*, 14th ed., p. 28, *Wennall v. Adney* (1802) (a), *Beaumont v. Reeve* (1846) (b), *Latouche v. Latouche* (1865) (c), *Bonner v. Wilkinson* (1822) (d), *Pickin v. Graham* (1833) (e), *Lundie v. Robertson* (1806) (f), and *Borradaile v. Lowe* (1811) (g). Secondly, the plaintiff is in any case entitled to recover £21 on the footing of a valid appropriation having been made by him of the £25 cheque to the matters not falling within the operation of section 5. The County Court Judge appears to have said that the only evidence of appropriation was the receipt for £45, on which statement the Divisional Court acted, and reversed his decision. That receipt was no doubt quite neutral, but the plaintiff actually made the appropriation in the witness-box on the second trial, and he was entitled to do so. The question had not become material before, and nothing had happened to prevent the plaintiff from so exercising his right. In *The Mecca* (1897) (h) Lord Macnaghten said that a creditor may appropriate “down to the very last moment.” *Friend, In re; Friend v. Friend* (1897) (i) is distinguishable. There being nothing illegal in the contract, the creditor may appropriate the second cheque in satisfaction of the debt which cannot be recovered by statute—*Crookshank v. Rose* (1831) (k), *Philpott v. Jones* (1834) (l), and *Mills v. Fowkes*

(a) 3 Bos. & P. 247, 249.

(b) 15 L. J. (Q. B.) 141; 8 Q. B. 483.

(c) 34 L. J. (Ex.) 85.

(d) 5 B. & Ald. 682.

(e) 2 L. J. (Ex.) 253; 1 Cr. & M. 725. (f) 7 East, 231. (g) 4 Taunt. 93.

(h) 66 L. J. (P.) 86, 90; [1897] A. C. 286, 293.

(i) 66 L. J. (Ch.) 737; *sub nom. Friend v. Young*, [1897] 2 Ch. 421.

(k) 5 Car. & P. 19; 1 Moo. & R. 100.

(l) 4 L. J. (K. B.) 65; 2 Ad. & E. 41.

(1839) (*m*). The case of *Wright v. Laing* (1824) (*n*), where the contract itself was illegal, is distinguishable.

G. A. Scott, for the respondent.—The Divisional Court was right in holding that the cheque was given without consideration.

(He cited in addition on this point the Bills of Exchange Act, 1882, s. 27.)

The real question on this appeal is whether there was any valid appropriation by the plaintiff. There is no evidence of appropriation prior to the action, and the plaintiff's statement in the witness-box did not amount to one, since it was made too late—*The Mecca* (*h*), *Friend, In re*; *Friend v. Friend* (*i*), and *Smith v. Betty* (1903) (*o*). In the absence of any other appropriation, the law will fix it at the date of the issue of the writ.

(VAUGHAN WILLIAMS, L.J., referred to *Peters v. Anderson* (1814) (*p*).

If the creditor receiving the money has not taken the trouble to notify his appropriation either expressly or by issuing the writ in such a way as to show his election, he ought not to be allowed to alter the rights after action brought, when the parties are at arm's length.

Harold Morris, in reply.—The plaintiff is willing to withdraw his claim to the £4 and confine his appeal to the £21 only on the footing of a valid appropriation having been made by him.

VAUGHAN WILLIAMS, L.J.—In this case the plaintiff at the time that he brought this action was an unregistered dentist, and was therefore subject to the operation of section 5 of the Dentists Act, 1878. The plaintiff brought his action in the High Court, and it was remitted to the County Court, and the defence, of which notice was given, was based upon section 5 of this Act of Parliament. Judgment was originally given in the County Court for the plaintiff for £25, the whole amount of the cheque which was dishonoured. The defendant appealed to the Divisional Court, and the Divisional Court were of opinion that the defence thus set up was a good defence so far as the consideration for the cheque was any dental operation or dental attendance or advice; but it was plain from the case opened by both sides that in part the consideration for which the cheque was given was not any dental operation or dental attendance or dental advice, but the making and supplying a dental bridge, and under those circumstances the Divisional Court, although allowing the appeal from the County Court Judge, remitted the case back to him expressly in order that he might determine

(*m*) 8 L. J. (C. P.) 276; 5 Bing. N. C. 455.

(*o*) 72 L. J. (K. B.) 853; [1903] 2 K. B. 317.

(*n*) 3 B. & C. 165.

(*p*) 5 Taunt. 596.

what, if any, part of the consideration was for goods supplied and work done outside the words of section 5 disentitling an unregistered dentist to sue for fees. I will only say in passing that it was quite plain that the Divisional Court on that occasion took the same view that we take in this case. The Divisional Court did not treat the contract or the consideration for the contract as being illegal or given in respect of an illegal purpose ; because, if they had come to either of those conclusions, or if they had come to the conclusion that the debt which is alleged to have arisen here—though by section 5 it could not be enforced by action—was a prohibited debt in respect of a prohibited contract, the Divisional Court would not have remitted the case to the County Court Judge, but would have disposed of the whole matter at once. In my opinion, it is quite plain that section 5 merely prevents the recovery by action of the fees and charges, and does nothing more. When the case came to be disposed of by the learned County Court Judge at the second hearing he found, amongst other things, that to the extent of £21 the cheque was given for goods supplied. That left £4 on the cheque, which would be applicable to the fees and charges for which, by section 5, an unregistered dentist was not entitled to sue. If we had to decide the question as to the right to that £4, there might arise a somewhat difficult point which is not absolutely concluded one way or the other by authority. But we have not got to decide that point. We have not to decide in this case whether a cheque given for such fees and charges was given for such consideration as would entitle an unregistered dentist to sue upon it. That is a point as to which I desire not to be taken as expressing any final opinion whatsoever. The reason why we have not to decide that point is that counsel for the plaintiff withdrew his claim altogether with respect to the £4. I therefore propose simply to deal with the £21. When once the conclusion is arrived at that this is not a case of illegal contract or illegal consideration at all, the cases which decide that where a cheque is given or a contract to pay is made in respect of which part of the consideration is illegal or unlawful no part of the contract can be enforced, have no application. With respect to the £21, which the County Court Judge found had reference to matters not falling within section 5, in substance the only matter which we have now to decide is whether the plaintiff had a right to appropriate which he exercised at a time when he was entitled so to do. It does not appear that this question was much argued or much discussed upon the appeal to the Divisional Court. A good many authorities have been cited upon the present appeal upon the question under what circumstances, and for how long, a creditor who

receives from the debtor a sum of money unappropriated to any particular debt has a right to appropriate. In some of the cases—I refer in particular to *Philpott v. Jones* (l) and *Peters v. Anderson* (p)—the matter was put in ways which vary a little in the different judgments. Sometimes it was said that the right of the receiver to appropriate lasted until the writ was issued. Sometimes it was said that it lasted until the matter came before the jury ; but it is not necessary to discuss those cases at length, because the question is really settled by the observations of Lord Macnaghten in the case of *The Mecca* (h), to which I will refer presently. But I wish first to say this : At one time it seems even to have been supposed that the receiver must exercise the right when he receives the money. At another time Mr. Justice Best, in *Simson v. Ingham* (1823) (q), seems to have thought he must do so within a reasonable time. But the various authorities which have been cited, and especially the two to which I have referred, put an end to either of these notions. What is plain throughout all the authorities is that the right which the receiver has is a right in the nature of an election ; and the question to be ascertained in each case is whether anything has happened to determine the right of the receiver to elect. Of course, the receiver of the money may make his election before there is any litigation whatever, or the litigation might be of such a nature that the election may be made by the issue of the writ in the case of a plaintiff or by the defence in the case of a defendant. But, on the other hand, there may be legal proceedings in which in no sense can the writ or the defence operate as an election, because there is nothing in the action which involves any election at all. Taking the case of the present action, the mere bringing of the action to recover the £25 obviously did not involve any election whatever. Nor did the fact that the plaintiff joined issue upon the defendant's notice of defence involve in this action any election with regard to the appropriation of this money. The first time at which any such question was raised was when the case was remitted to the County Court Judge by the Divisional Court in order to ascertain whether there had been any, and what, consideration in respect of matters outside section 5 for which this cheque had been given ; and it is beyond dispute that the plaintiff did, in the witness-box in the County Court, make his election. In my opinion he was entitled to do so if nothing had happened before to determine his right of election. I think that there was nothing which the plaintiff had done up to that time which determined his election to appropriate or which amounted to an appropriation made by him before the second

hearing of this case. Counsel for the defendant fixed the time of appropriation as the date of the issue of the writ, and said that from that moment not only was the plaintiff's right determined, but also the appropriation was effected by law ; but though very often an appropriation is effected by law, whether by the application of the rule in *Clayton's Case* (1816) (*r*) or otherwise, yet I know of no rule of law which would apply to this particular case. Under these circumstances we have to consider whether there is anything in the rule laid down by Lord Macnaghten in *The Mecca Case* (*h*) which determined the plaintiff's right of election. The noble Lord there said : " Now, my Lords, there can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor. In 1816, when *Clayton's Case* (*r*) was decided, there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the civil law, or at any rate, within a reasonable time, whatever that expression in such a connection may be taken to mean. But it has long been held, and it is now quite settled, that the creditor has the right of election ' up to the very last moment.' " Applying that rule to this case, in my opinion there was nothing done down to the moment when the plaintiff made his statement in the witness-box to determine his right, and under these circumstances he had, in my judgment, a right to appropriate. That being so, there is an end of the case. I agree with the Divisional Court that as between the original parties to this cheque the plaintiff might recover so much as was attributable to matters outside the Act. I therefore think that the plaintiff exercised his right of appropriation effectively, and at a time when he was entitled to do so. The result will be that judgment must be entered for the plaintiff for £21.

ROMER, L.J.—I have come to the same conclusion. The Court below on the first appeal decided that, with regard to the cheque for £25 sued upon, the plaintiff was not entitled to recover so far as it was given for work done coming within the provisions of section 5 of the Dentists Act, 1878. That was the main point decided in the action ; but the Court pointed out, and I think rightly, that so far as the cheque represented work done or materials supplied outside section 5 the plaintiff ought to recover, and accordingly remitted the case to the County Court Judge

for him to determine what part represented work done and materials supplied outside that section. The County Court Judge found that the plaintiff was entitled to £21 on the above view. Then the circumstances before him gave rise to a further question, and I think for the first time in the action—namely, the point of appropriation—the question being whether the prior payment made by the defendant ought to be held as appropriated to the work done by the plaintiff which was within the operation of section 5 or not. If the prior payment were not to be so appropriated, then the County Court Judge found that only £1 was due in respect of the cheque for £25. The County Court Judge in this action held that the prior payment of £20 ought to be appropriated to the work done by the plaintiff within the operation of section 5, and accordingly gave the plaintiff £21. The Divisional Court reversed this, but on the ground of a question of evidence which I need not consider, because I think there is a ground on which £21 should be recoverable, which, as my Lord has pointed out, was not dealt with in the judgment of the Divisional Court, and appears not to have been considered by them. The ground is this: When the payments were made by the defendant no appropriation was made by him at the time. According to the law that left it to the plaintiff. It is clear that there was no appropriation by the plaintiff at any time before the action came on a second time before the County Court Judge. The question is whether at that time the plaintiff could or could not appropriate. I think he could do so. The case of *The Mecca* (h), referred to by my Lord, shows that, as a general principle, in such a case the plaintiff is entitled to appropriate down to what is called “the very last moment.” What is the last moment must depend on the circumstances of each case. In the present case, there being no rights of third parties intervening and under the peculiar circumstances which I have pointed out—namely, that the question did not arise until the second trial came on, I think that the plaintiff retained the right of appropriation until the second trial. At that trial he clearly exercised the right and appropriated the £20 payment to the work within the operation of section 5, and the £25 cheque to the work outside the operation of that section. That being so, the plaintiff is entitled to recover the full amount of £21. The plaintiff under these circumstances has said that he does not desire to press his claim for the extra £4, and therefore we need not decide whether the Divisional Court came to a right conclusion on the main point; but I desire to say that it must not be supposed that I have come to the conclusion that their decision was wrong. Under these circumstances the only other question is as to costs. I think that the

plaintiff has substantially succeeded and ought to get the costs of these proceedings. I should like to add with regard to what fell from counsel for the defendant—namely, that the appropriation being made so late was hard on the defendant—that the defendant cannot be in a better position because he did not know the law. As he did not appropriate himself when he made the payment, and as he had no ground for thinking that the plaintiff had made any appropriation, he ought to have known that the plaintiff possessed the right to appropriate, and he cannot complain that the plaintiff exercised it in the way in which it is obvious that he would exercise it—namely, in his own favour. I think therefore that the costs ought to follow the result in the usual way.

STIRLING, L.J.—I am of the same opinion, and substantially for the same reasons. I desire to say with respect to the first question, whether the plaintiff was entitled to recover the full amount of the cheque, that it seems to me clear that section 5 does not make it illegal for any person, although neither a registered dentist nor a legally qualified medical practitioner, to perform dental operations or to give dental attendance or advice within the meaning of section 5; and it is obvious that the Divisional Court was of the same opinion, because if any of these matters had been illegal the whole action for the recovery of the cheque would have failed, and it would not have been sent back to the County Court Judge as it was. All that section 5 does is to prevent a person from recovering any fees or charges unless registered under the Act or unless a legally qualified medical practitioner. Under these circumstances, whether the plaintiff was or was not entitled to recover the whole amount is a point upon which I desire to express no opinion—certainly none differing from, and none in favour of the view taken in the Divisional Court, the reason being that I have not been able to fully consider the matter or to arrive at a conclusion satisfactory to my own mind. The question which remains is whether the plaintiff was entitled at the second trial for the first time to make the appropriation in respect of the second cheque which was sued upon. Upon that I have come to the same conclusion as my brethren—that he was so entitled. The case of *The Mecca* (*h*) decided that a creditor, where no appropriation is made by the debtor at the time of payment, is entitled to appropriate “down to the very last moment.” That means, I think, until something has happened which prevents him from exercising his right—some event which clearly prevents it, as when the creditor has already made an appropriation and communicated it to the debtor. It is quite clear that by bringing an action the creditor may in fact

show that he has made an appropriation, and the very form of the writ may show a communication of an appropriation to the debtor. The same result may arise in other ways. In *Friend, In re; Friend v. Friend* (i), it was held, for instance, that the form of proof showed that an appropriation had been made, and amounted to a communication of it to the debtor; and in *Smith v. Betty* (o) an action was brought in which the Statute of Limitations was pleaded, and at the trial an order was made by which an account was directed in substance precluding statute-barred items, and it was held that the form of the judgment which precluded the statute-barred items also prevented the appropriation by the plaintiff after judgment of certain moneys to statute-barred items. I am not professing to give an exhaustive account of the circumstances which may preclude a creditor from exercising his right of appropriation. All that it is necessary to say is that until something has happened which would render it inequitable for him to do so, he is at liberty to exercise it. In this case certainly nothing had occurred down to the second trial which rendered it inequitable for the plaintiff to do so. Really the question whether anything had taken place to make it necessary or desirable to make the appropriation did not arise until the second trial. Then at the trial there was no writ or pleading which debarred the plaintiff from exercising his right, and at the trial he did exercise it in answer to a question put to him by his counsel, and it seems to me that he was in no way precluded from so doing. This point does not seem to have been raised before the Divisional Court, and in other respects I agree with what they decided; but I think the plaintiff under these circumstances is entitled to judgment for £21, with costs in the usual way.

Appeal allowed.

ATTORNEY-GENERAL (O'DUFFY) *v.* MR.
APPLETON, SURGEON-DENTIST, LIMITED,
AND OTHERS

1905. *Feb.* 15.

[5 N. I. J. R. 170]

Reported also :

[1907] 1 I. R. 252.

See also Minutes of General Medical Council :

Vol. XLII. (1905) 320-333.

Dentists Act — Registered Company — Fraudulent — Action against in Chancery—Injunction.

A one-man company was duly registered under the title of "Mr. Appleton, Surgeon-Dentist, Limited," for the purpose of carrying on the business of dentistry and dental surgery. The managing director was a Mr. Frederick Appleton, who was not a qualified dentist, nor were any of the signatories of the memorandum of association qualified dentists. The business of the company was not carried on by qualified dentists.

Held, that notwithstanding the remedies that might otherwise exist, a Court of Chancery has jurisdiction to grant an injunction against such a company and the directors and signatories, to restrain them from carrying on business under and from taking or using the title which the company had adopted, or any other name or title implying that the business of the company was carried on by persons registered under the Dentists Act, 1878.

Motion on notice for judgment in default of defence. The action was brought by the Attorney-General for Ireland at the relation of Kevin E. O'Duffy. The defendants were a limited company, "Mr. Appleton, Surgeon-Dentist, Ltd.," and others. The statement of claim set out that the defendants wrongfully and fraudulently, and with intent to injure and deceive the liege subjects of His Majesty, and to injure and defraud the persons registered under the Dentists Act, 1878, conspired together to form, and did form, and procured to be registered the defendant company. This Company was incorporated under the Companies Acts on March 21st, 1904. The capital of the Company was £500, divided into 500 shares of £1 each, all of which had been issued, and which had been allotted to the defendants as follows:—Frederick Appleton, 344 shares; Ethel Appleton, 100 shares; Martha Stuart, 50 shares; Eunice Grace Coates, Samuel Malcolmson, J. S. Balmer, W. Robinson, F. C. Doran, and Edith Coates, one share each. The defendants Frederick Appleton and Edith Appleton were the directors of the company, and the former was the managing director and the secretary. Amongst the objects for which the company was established, as stated in the memorandum of association, were the following:—" (a) To carry on, through competent persons, the business of dentists and dental surgeons, in such parts of the United Kingdom of Great Britain and Ireland as the directors shall from time to time appoint, and in particular Bangor, Co. Down." " (k) To adopt such means of making known the products and business of the company as may seem expedient, and in particular by advertising in the press, by circulars, and by publication of books and pamphlets." The defendant company had been extensively advertised in the North of Ireland, and by reason

of the formation and advertising of the company under their registered name, the public had been, and were liable to be, led to believe that the business of the company was being carried on by persons registered under the Dentists Act, 1878, and that there was connected with the management of the company one Mr. Appleton, who was a person registered under the said Act, and entitled to take or use the title of surgeon dentist. The defendant company was formed and procured to be registered, as aforesaid, by the signatories to the memorandum of association thereof, for an unlawful purpose, namely, for the purpose of imposing upon and deceiving the public, by falsely representing to them that the business of the company was conducted or carried on by persons registered under the Dentists Act, 1878; and for the purpose of injuring and defrauding persons duly registered under that Act, by depriving them of the fees and charges for the performance of dental operations, and for dental attendance and advice, which were by the said statute made recoverable only by persons registered thereunder, or by legally qualified medical practitioners; and for the purpose of taking and using the title "surgeon-dentist" against the provisions in that behalf of the Dentists Act, 1878. The defendant company was not registered, or capable of being registered, under the Dentists Act, 1878. Neither of the directors of the said Company, nor were any of the signatories to the memorandum of association, so registered. And the business of the said company was not conducted or carried on by any person or persons registered under the Dentists Act, 1878, or entitled to take or use any name, title, addition, or description implying that he was so registered or that he was a person specially qualified to practise dentistry.

The plaintiff's claim was for an injunction to restrain the defendant company from carrying on business, and from advertising for custom under, and from taking or using the name of Mr. Appleton, surgeon-dentist, or any name or style containing the word dentist either alone or in combination with any other word or words, or any name, title, addition, or description, implying or reasonably calculated to induce the public to believe that the business carried on by the said Company was conducted or carried on by a person or persons registered under the Dentists Act, 1878, or specially qualified to practise dentistry; and for an injunction to restrain the defendants, Frederick Appleton, Eunice Grace Coates, Samuel Malcolmson, James S. Balmer, Edith Jane Appleton, Wm. Robinson, Fred. C. Doran, and Edith Emiline Coates, and each of them, from allowing the defendant company to remain registered under its present name, or any such name, style, title, or description as aforesaid.

A. W. Samuels, K.C., with whom was *Gerald FitzGibbon*, for the plaintiff.—The facts in the statement of claim are admitted. There is no doubt that the company is fraudulent (*Rex (Rowell) v. Registrar of Joint Stock Companies* [ante, page 231]). The case of *O'Duffy v. Jaffe* [ante, page 228] gave no sanction to the formation of such companies. The signatories to the memorandum of association are liable as well as the directors (*Panhard Case*, [1901] 2 Ch. 513). The Court clearly has jurisdiction in a case of this kind (*Attorney-General v. Ashbourne Recreation Ground Co.*, [1903] 1 Ch. 101; *Attorney-General v. Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; *Mayor of Devonport v. Tozer*, [1903] 1 Ch. 759). The company in the present case is still in existence (Companies Act, 1862, ss. 129, 131, 132).

W. J. Johnston for the defendants, Frederick Appleton and Edith Appleton.—The defendants do not contest, and never did contest, the right of the plaintiff to an injunction, and they offered to wind up the company when the action was threatened. As a matter of fact, the company now is wound up and is out of existence. It was formed under a misapprehension, and practically never did any business, and no private interests were damnified. The present action is a test one, at the instigation of the British Dental Association, and was brought to get a declaration in Chancery with reference to the status of all these companies, and not for the purpose of asserting any private right. Under these circumstances the defendants ought not to be ordered to pay any costs.

SIR A. M. PORTER, Bart., M.R. said :—This case comes before me on a motion for judgment against the defendant and the company. The statement of claim avers that the company was wrongfully and fraudulently formed with intent to injure and deceive the public, and to injure and defraud persons registered under the Dentists Act, 1878. There is no defence—that is to say, the defendants have admitted the truth of that averment by not denying it; they admit that they have not only violated the law, but that they did it fraudulently. That averment is distinctly admitted; nor, indeed, could it be questioned upon the facts. In this case the language that was used, that it was “an audacious “fraud,” was not a bit too strong. If there were no Act of Parliament at all bearing on the question, and if this were merely the case of a gentleman setting up on his hall door a brass plate, “Mr. Appleton, Surgeon-Dentist, Limited,” the word “limited” being either in large or small letters, the passers-by would believe beyond all doubt that it belonged to a person who was a surgeon-

dentist. But the word "Mr." would emphasise the fact that there was to be found within a person who was a surgeon-dentist. It is open to anyone forming a company, under certain restrictions, to register it in any name he pleases. But the persons who registered this company had obviously before their minds, apart from the question of whether it was legal or not, the intention of telling a falsehood, for the purpose of misleading the public to believe that there was a Mr. Appleton, a surgeon-dentist, to be found at the address given. The Dentists Act, 1878, is founded upon the highest public policy. The Act was passed for the purpose of preventing unqualified persons from holding themselves out as being qualified to practise as dentists. At one time, no doubt, dentistry was looked upon by some as a lower branch of science ; it was once looked upon as an inferior profession, if it could be called a profession at all. But increasing knowledge has shown that it is an art that is capable of the highest development and extension. And just as those who are connected with particular branches of the medical and surgical profession should have the highest qualifications, so it is most important that dentists should have special and particular qualifications. Now, is this Act for the public benefit ? I find that everything in the Act proceeds upon the assumption that it is for the public benefit. I do not criticise the case of *O'Duffy v. Jaffe* at all. It is decided, and by that decision every Court in this country is bound, and whilst deferring to it, I, like the Chief Baron, express neither approval nor disapproval of it. The only real difficulty that has occurred to me in this case was that of jurisdiction. This is a new offence. There is a remedy provided under the Dentists Act, that is, by prosecution of the person in a court of summary jurisdiction. Generally speaking, where there is a new offence the remedy given by the statute creating the offence is exclusive. But the existence of power to sue for penalties does not of itself prevent the interference of the Attorney-General, seeking an injunction in the interests of the public by way of information. The public interests are committed to the care of the Attorney-General, as representing the Crown, and in that way he represents the public. The Attorney-General has sometimes declined to allow proceedings to go on, even with a competent relator. But that is not the case here. The Attorney-General probably sues at the relation of the secretary of the British Dental Association for the purpose of restraining a fraud upon the public. It is not necessary for him to show that any particular individual has suffered. This fraud may have succeeded, or it may not, in inflicting individual injury or loss. People may have imperilled their lives by com-

mitting themselves to the care of this limited liability dentists' company. The Attorney-General represents the Crown in this matter. The whole public are interested in stopping this organised system; and finding that there is no possibility of dealing with it now under the penal sections of the Act, having regard to the decisions in *O'Duffy v. Jaffe*, he takes the step of coming to the Court of Chancery for an injunction to stop this fraud. This is a case in which a fraud has been discovered. The Attorney-General says this is a matter affecting the whole public, and so it is. It is no answer to an application for an injunction to say that the offence here is an indictable misdemeanour. I have no doubt that it is an indictable misdemeanour, because at common law it is an indictable misdemeanour to conspire to defeat an Act of Parliament. It is no answer to this application to say that the signatories could be criminally prosecuted. I have no doubt whatever that at common law they could all be prosecuted for conspiracy. The Attorney-General is entitled to apply to stop this fraud, and he is entitled to succeed. He is entitled to judgment against all the defendants, including the company, with costs. The company, it seems to me, has not been properly wound up; it is existing still in its corporate capacity. It could go on advertising and doing business now, just as much as at any time since its formation, under the guise of trading only for the purpose of beneficially winding up.

ATTORNEY-GENERAL v. MYDDLETON'S
LIMITED, ALFRED MYDDLETON & OTHERS

1907. June 13.

[From the British Dental Journal, Vol. XXVIII, page 840]

Reported also :

[1907] 1 I. R. 471.

Although a limited company, having for its object the practice of dentistry and the employment of qualified persons in connection therewith, is not a "person" within the meaning of the 3rd section of the Dentists Act, 1878, and therefore cannot be prosecuted under that section, it may not make false representations as to the qualifications of the individuals whom it comprises or employs, and an injunction will be granted restraining a company from so doing.

Action.

The statement of claim was as follows:—

“(1) The defendants, Alfred Myddleton, Amy Myddleton, William Boles, James Cochrane, William Greenlee, John Walters and Robert G. Gordon, wrongfully and fraudulently and with intent to injure and deceive the liege subjects of His Majesty, and to injure and defraud the persons registered under the Dentists Aet, 1878, conspired together to form, and did form, and procured to be registered, the defendant company, Myddleton’s, Limited.

“(2) The defendant company, Myddleton’s, Limited, was incorporated on June 28, 1902, and was registered under the Companies Acts, 1862 to 1900, as a company limited by shares, having a nominal capital of £1,000, divided into 1,000 shares of £1 each, all of which were allotted to the defendants other than the defendant company, and are now held by them. Nine hundred and ninety-three shares were allotted to the defendant, Alfred Myddleton, for an alleged consideration other than cash, and one share was allotted to each defendant, other than the company, for an alleged consideration of £1.

“(3) The defendants, Alfred Myddleton and Amy Myddleton, are the directors, and the defendant Alfred Myddleton is the manager and secretary, of the defendant company, and the defendants, other than the company, are the signatories to the Memorandum of Association of, and the only shareholders in, the defendant company.

“(4) Among the objects, as stated in the Memorandum of Association of the defendant company, for which the incorporation of the defendant company was procured by the other defendants, are the following: ‘To carry on in any part of the United Kingdom, or elsewhere, all or any of the trades or businesses of surgeon-dentists, dentistry, teeth specialists and manufacturers and dealers in dental materials and appliances, and any other business which, in the opinion of the company, can be conveniently carried on by the company in connection with the above, or any of them, and to employ properly qualified persons to act on the company’s behalf as surgeon-dentists or otherwise in connection with the said businesses aforesaid, or any other trade or business which may be carried on by the company in any manner in which such persons might act if they or he were carrying on upon his or their own behalf any of the businesses of the company.’

“(5) In pursuance of the conspiracy aforesaid, the defendant company has been, and is still being, extensively advertised in Belfast, Lisburn, Lurgan, Portadown, Downpatrick, and other

towns in the North of Ireland, as Myddleton's, Limited, Surgeon-Dentists and Specialists in American Dentistry, and the public are, by such advertisements, bidden to ask for Messrs. Myddleton's, the largest dentists in Ireland, and the advertisements and handbills of the defendant company are prepared and issued with the object of inducing the public and customers of the defendant company to believe that the business of the company is conducted and carried on by persons registered under the Dentists Act, 1878, or specially qualified to practise dentistry.

"(6) The defendant company was formed and procured to be registered as aforesaid by the signatories to the Memorandum of Association thereof for an unlawful purpose, to wit, for the purpose of imposing upon and deceiving the public by falsely representing to them that the business of the company was conducted or carried on by persons registered under the Dentists Act, 1878, and for the purpose of injuring and defrauding persons duly registered under that Act by depriving them of the fees and charges for the performance of dental operations, and for dental attendance and advice, which are by the said Statute made recoverable only by persons registered thereunder, or by legally qualified medical practitioners, and for the purpose of taking and using the title dentist and surgeon-dentist, against the provisions in that behalf in the Dentists Act, 1878.

"(7) The defendant company is not registered, or capable of being registered, under the Dentists Act, 1878. Neither of the directors of the said company, nor any signatory to the Memorandum of Association of the said company, is so registered. The business of the said company is not conducted or carried on by any person or persons registered under the Dentists Act, 1878, or entitled to take or use any name, title, addition, or description implying that he is so registered, or that he is a person specially qualified to practise dentistry.

"(8) The defendant company, and the directors and members thereof, have employed the defendant, Alfred Myddleton, to carry on business under the Memorandum of Association of the said company, under the titles of surgeon-dentist and dentist, and have falsely and fraudulently held forth and represented in the register of directors and managers of the company, and in the reports and returns made to the Registrar of Joint Stock Companies pursuant to the provisions of the Companies Acts, 1862 to 1900, that the said defendant, Alfred Myddleton, the secretary, manager, and one of the directors of the defendant company, is a dentist."

The plaintiff's claim is for :—

"(1) An injunction to restrain the defendant company from

advertising for custom under, and from taking or using the name, style, addition or description of dentists or surgeon-dentists, or any name, style, addition or description containing the word dentist, either alone or in combination with any other word or words or any name, title, style, addition or description implying or reasonably calculated to induce the public or persons dealing with the said company to believe that the business carried on by the said company is conducted or carried on by a person or persons registered under the Dentists Act, 1878, or specially qualified to practise dentistry.

“(2) A declaration that the defendant company was not formed for a lawful purpose under the provisions of the Companies Acts, 1862 to 1900, and is not entitled to be or remain registered under the Companies Acts.

“(3) An injunction to restrain the defendant company and the directors and members thereof, from employing the defendant, Alfred Myddleton, under the title surgeon-dentist, or dentist, to carry on business under the Memorandum of Association of the said company, and from holding forth or representing in the register of directors and managers, or the reports or returns made pursuant to the Companies Acts to the Registrar of Joint Stock Companies, or elsewhere or otherwise, that the defendant, Alfred Myddleton, is a dentist.

“(4) An injunction to restrain the defendant company from carrying on the business of dentists, or surgeon-dentists, under the Memorandum of Association of the said company.

“(5) An injunction to restrain the directors and members of the defendant company from allowing the said company to remain registered under its present Memorandum of Association.”

The defence, after a general denial of the allegations in the statement of claim, proceeded:—

“As an alternative defence to the plaintiff's action the defendants deny that any of the acts complained of, done by them, were wrongful, fraudulent or unlawful, or partook of the nature of a criminal conspiracy, or that same were done with intent to injure, deceive, impose upon, or defraud anyone, or that the defendant company was formed or registered, or that same exists for any unlawful purpose. As a further defence the defendants say that the relator, Kevin E. O'Duffy, is the secretary of an organisation seeking to create in Ireland for the members thereof a mischievous monopoly whereby the public would have no recourse for artificial mechanical assistance, or for treatment connected with the teeth, to any person save themselves, of said organisation, whereas Parliament has refused and refuses to restrain limited companies from carrying on such trade or business under the

Companies Acts, notwithstanding the repeated efforts of the relator's organisation, and defendants further say that as a result of the relator's organisation, malpractices and the exaction of exorbitant charges are shielded. The defendants submit that it is an ease of the liege subjects of His Majesty that competition should exist to prevent the formation of a ring, either in the manufacture or manipulation of artificial teeth and their adjuncts, or otherwise, and they deny that they did any unlawful act, or engaged in practice contrary to law."

In addition to the Memorandum of Association various advertisements (referred to in the judgment) were put in evidence. Also an agreement between Alfred Myddleton and the company whereby, after reciting that he had "for some time past carried "on business as a teeth specialist and the adapting and fitting "of artificial teeth" in Belfast, Alfred Myddleton agreed to sell and the company agreed to buy at the price of £993, payable in shares of the company, the goodwill of such business with all stock apparatus, &c., used therewith. Also the return required by the Companies Acts to be filed annually by the company which described Alfred Myddleton as "dentist." There was no oral evidence.

Ronan, K.C., Samuels, K.C., and Fitzgibbon for the plaintiffs, cited *O'Duffy v. Jaffe* [ante, page 228], *R. v. Registrar of Joint Stock Companies* [ante, page 231], and *Attorney-General v. Appleton* [ante, page 252].

Brown, K.C., Healy, K.C., Whitaker, K.C., and Whitaker, for the defendants, relied on the *Pharmaceutical Society v. London and Provincial Supply Association Limited* (a).

Samuels, K.C., in reply.

Judgment reserved.

MR. JUSTICE BARTON.—In applying to the present case the authorities which have been cited the particular form and character of this proceeding have to be borne in mind, as well as the peculiar nature of the rather scanty evidence which the plaintiff laid before the Court. *Jaffe's case* [ante, page 228] was an appeal from a justices' conviction, under section 3 of the Dentists Act, 1878. *Rowell's Case* [ante, page 231] was an application for a *mandamus* to the Registrar of Joint Stock Companies to register a limited company. *Hennan and Co., Limited v. Duckworth* [ante, page 234] was an action for work done and goods supplied. *Appleton's Case* [ante, page 252] was like the present one, an action for a Chancery injunction at the suit of the Attorney-General, to restrain a public fraud. But

(a) 5 A. C. 857; 49 L. J. (Q. B.) 736; 45 L. T. 389; 45 J. P. 20; 28 W. R. 957.

there is an important difference between that case and this one. In *Appleton's Case* the Court had an easy task, because fraud was admitted. In the present case nothing was admitted and the burden lies on the plaintiff to establish his case by evidence. The plaintiff has produced no oral evidence as to the operations of the company and has relied principally upon the Memorandum of Association, official reports and advertisements.

I cannot say that the Memorandum of Association in this case is open to legal objection. The title of this company does not contain the word "dentist," or any of its synonyms, or any allusion to dentistry. The principal purpose of incorporation was to carry out dental operations by means of properly qualified persons, a purpose which is not *per se* illegal. If the company were to carry out dental operations by means of unqualified persons, serious questions might arise, including the question of *ultra vires*. But there is no evidence in this case upon that question of fact. We do not know who has carried out the dental operations of this company. We may have suspicion in view of the contents and character of those widely-circulated advertisements, but there is no evidence on the point. I have said enough to show that the plaintiff claims wider relief than the evidence justifies.

The plaintiff has, however, established his right to the relief claimed in paragraph 3 of the prayer of the statement of claim with some amendment and enlargement. That relief is limited to misrepresentation as regards Alfred Myddleton or persons of that name. Alfred Myddleton was the originator of the company and has acted as its managing director, but it has not been proved that he or any person of his name has since its incorporation carried out any of the dental operations of the company. But we know that neither he nor any individual of his name is a registered dentist, and there is evidence to which I shall refer that the defendants have made representations to public officials in official documents, and to the public in advertisements and announcements, which were calculated to induce the belief that Alfred Myddleton or individuals of that name were or are registered dentists.

In the report registered November 1, 1902, and made to the Registrar of Joint Stock Companies pursuant to section 12 of the Companies Act, 1900, we find in the list of directors Alfred Myddleton described as a dentist. The report was certified by him as director. In the registered return of allotments, from June 1902 to June 1903, made in pursuance of section 7 (1) of the Companies Act, 1900, Alfred Myddleton appears as allottee of 994 out of 1,000 shares, and is described as dentist. The report was signed by Alfred Myddleton as secretary. In the register

of directors and managers, registered November 1, 1902, Alfred Myddleton was described as dentist, and the register is signed by him. In the list of persons holding shares made up to February 15, 1904, and signed by Alfred Myddleton as managing director and secretary, Alfred Myddleton was described as dentist. It is admitted that these descriptions of Alfred Myddleton as a dentist cannot be justified, but it is said that they are isolated acts, not recently repeated or likely to be repeated. But they do not stand alone. I find in the advertisements of the company several passages which I think amount to representations which are reasonably calculated to lead the public to believe that the company comprises or employs persons named Myddleton, who are registered dentists. For example, in the handbill advertisement headed on one side "reliable dentistry," and also in another headed on one side "teeth of quality," there is the statement, "Make no mistake, ask for Myddletons, the largest dentists in Ireland." In several of the advertisements the company gives to the public their telegraphic address as "Myddletons, Dentists, Belfast." There are other notices and advertisements in which the company refer to themselves as "Messrs. Myddletons, Limited, largest dentists in Ireland." These advertisements seem to me to be calculated to lead the public to believe that the company comprises or employs individuals of the name of Myddleton who are properly qualified dentists. I must add that these representations have an added significance when they are coupled with the announcement that "anæsthetics including chloroform can be administered at any hour"; as to which the public might be expected to look for and to be attracted by any representation of proper qualifications.

I am disposed to think that defendant's counsel have endeavoured to found upon *Jaffe's Case* a larger claim of privilege for companies than the decision in that case will support. They claim for limited companies, as a result of that case, an unrestricted right to use the word "dentist" or its synonyms in any and every shape and in any and every context. *Jaffe's Case* decided that the word "person" in section 3 of the Dentists Act, 1878, does not include artificial persons, and that the section hits individuals but does not hit limited companies. But a company, although it may be exempted from the penalties imposed by that section is not, in my opinion, thereby privileged to make false representations, which are calculated to mislead the public as to the qualifications of the individuals whom it comprises or employs. I think that the official documents and advertisements to which I have referred contain representations of that kind. There may be other advertisements or

announcements of the same kind, each might have to be considered on its own merits.

There will be an injunction to restrain the defendant company and the directors and members thereof from employing the defendant, Alfred Myddleton, under the title of surgeon-dentist or dentist, to carry on business under the memorandum of association of the said company, and from holding forth or representing in the register of directors and managers or the reports or returns pursuant to the Companies Acts to the Registrar of Joint Stock Companies or in their advertisements to the public or elsewhere, or otherwise, that the defendant, Alfred Myddleton, is a dentist, or that the defendant company comprises or employs persons of the name of Myddleton who are dentists.

Plaintiff has partially succeeded, and if he had limited his claim to the relief claimed in paragraph 3 of the prayer of the statement of claim he would be entitled to the whole costs of the action. The order as to costs will be that the plaintiff shall have the costs of the action, save in so far as they have been increased by the relief claimed in the other paragraphs of the prayer of the statement of claim, which shall be set off.

CLIFFORD *v.* TIMMS

CLIFFORD *v.* PHILLIPS

HILL *v.* CLIFFORD

[76 L. J. (Ch.) 265, 627 ; 77 L. J. (Ch.) 91]

Reported also :

[1907] 1 Ch. 420 ; [1907] 2 Ch. 236 ; [1908] A. C. 12, 15 ;
96 L. T. 255 ; 97 L. T. 266 ; 98 L. T. 64 ; 52 Sol. Jo.
92 ; 23 T. L. R. 274, 601 ; 24 T. L. R. 112.

See also Minutes of General Medical Council :

Vol. XLIII. (1906) 66 to 69, 275 to 279.

Vol. XLIV. (1907) 130, 387 to 391.

Vol. XLVIII. (1911) 122 (restoration to Register).

CLIFFORD *v.* TIMMS

(WARRINGTON, J.) 1907. Jan. 26.

Partnership—Articles—Construction—“ Professional misconduct ”—Dentist—Evidence—Order of General Medical Council—

Admissibility—*Dentists Act*, 1878 (41 & 42 Vict. c. 33), ss. 2, 13, 14, and 15.

Articles of partnership between dentists (plaintiff and defendant) provided that, if either partner should be guilty of professional misconduct or of any act calculated to bring discredit on or injure the other or the partnership business, the other might determine the partnership by notice. The General Medical Council made an order under the Dentists Act, 1878, directing the plaintiff's name to be erased from the Dentists Register on the ground that, on facts found by the committee (on whose report the council act), he had been proved to be guilty of conduct infamous or disgraceful in a professional respect. In an action to determine whether the partnership had been properly determined by notice given by the defendant,—Held, that the order (and report) were not admissible as evidence on the question whether the plaintiff had been guilty of professional misconduct or any act calculated to bring discredit on or injure the defendant or the partnership business within the meaning of the articles.

The plaintiff and the defendant were partners in the business of dentists. The articles of partnership, which were dated October 2, 1899, contained a provision (clause 23) which, so far as material, was in these terms: "If either partner shall at any time during the continuance of the partnership be guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the other partner or the partnership business, the other partner shall be at liberty to give notice in writing of his intention to determine the partnership, and thereupon the partnership shall be dissolved and wound up under the provisions of these presents in the same manner as if the offending partner had died on the day of the date of such notice." On June 28, 1906, the defendant gave to the plaintiff a notice in writing in these terms: "Whereas you have been guilty of professional misconduct within the meaning of clause 23 of the deed of partnership entered into between us and dated October 2, 1899, I hereby give you notice of my intention to determine the partnership created by the said deed." Some discussion and negotiation between the parties took place in consequence of that notice, but the negotiation fell through, and ultimately on August 20, 1906, the defendant gave to the plaintiff another notice in the same terms as that of June 28. The plaintiff, by this action, claimed a declaration that the notices were invalid and that the partnership still subsisted, and also an injunction to restrain the defendant from acting upon the notice.

The defendant alleged that the plaintiff had in fact been guilty of professional misconduct within the meaning of the articles. The plaintiff denied it, and insisted that the notices were ineffectual and that the partnership was subsisting. The question therefore to be determined was whether the plaintiff had or had not been guilty of professional misconduct within the meaning of the articles of partnership.

The defendant tendered in evidence an order, dated May 24, 1906, of the General Medical Council, acting under the powers of the Dentists Act, 1878, and a report, dated May 19, 1906, of the committee upon whose findings the order was based. The order directed the registrar to erase from the Dentists Register the names of the plaintiff and certain other persons on the ground that it had been proved on the facts as found by the committee that they had been guilty of conduct which was "infamous or disgraceful in a professional respect" within section 13 of the Act. Objection was taken to the admissibility of both documents, but the Court admitted the order upon grounds which WARRINGTON J., subsequently (see his judgment) thought insufficient. The report was by arrangement put in *de bene esse*.

The facts properly proved or admitted were as follows: In the year 1887 a company was incorporated under the Companies Acts, under the name of the American Dental Institute, Limited. The plaintiff was at all material times one of the principal shareholders in and a director of this company. The company carried on dental practice at various places in London and elsewhere. The company to the plaintiff's knowledge employed certain unregistered persons to attend patients and perform dental operations upon them. Some of these persons were proved to have on one or two occasions used the title of "doctor." The company to the plaintiff's knowledge advertised by certain pamphlets which were referred to (a).

H. Terrell, K.C., A. Houston, and R. J. Drake for the plaintiff.

Norton, K.C., and E. F. Buckley, for the defendant.

(The following cases were referred to on the question of the admissibility of the order of the Medical Council: *Yates v. Kyffin-Taylor* (b), *Leyman v. Latimer* (c), *March v. March* (d), *Castrique v. Imrie* (e), and *Harvey v. Regem* (f).

WARRINGTON, J. (after referring to the articles of partnership)—

(a) [See more fully, *post* page 292].

(b) W. N. (1899), 141.

(c) 47 L. J. (Ex.) 470; 3 Ex. D. 352, 354.

(d) 28 L. J. (P.) 30.

(e) 39 L. J. (C. P.) 350; L. R. 4 H. L. 414.

(f) 70 L. J. (P. C.) 107; [1901] A. C. 601.

The main foundation on which the defendant rests his claim to be entitled to give the notices of June 28 and August 20 is the fact that on May 24, 1906, the General Medical Council, acting under the powers conferred upon them by the Dentists Act of 1878, made an order directing the registrar to erase from the Dentists Register the names of the plaintiff and certain other persons on the ground that it had been proved that they had been guilty of conduct which was "infamous or disgraceful in a professional respect."

By the Dentists Act, 1878, it is provided as follows, so far as the provisions therein are material for the purpose of this case: [His Lordship read sections 2, 3, 5, 13, 14, and 15] The order of May 24 contained a statement that on the facts found by the committee it had been proved that the plaintiff had been guilty of conduct which was "infamous or disgraceful in a professional respect." The defendant tendered in evidence the order of May 24 and the report, dated May 19, of the committee, and further insisted that they were together conclusive evidence that the plaintiff had been guilty of conduct infamous or disgraceful in a professional respect, and that, that being so, the Court must hold that he had been guilty of professional misconduct within the meaning of the articles. Objection was taken to the admissibility of both these documents. I admitted the order on a ground which, on consideration, and having regard to what I now hold to be the real issue to be tried, I do not think sufficient. The report of the committee was by arrangement put in *de bene esse*; and the question as to the admissibility and effect if admissible, of both these documents is, I think, open.

The question as to the admissibility and the effect, if admissible, of both these documents must, in my opinion, be determined by considering the issue which I have to try. That issue is not whether the plaintiff's name has been removed from the register. If it were, the order would, I think, be admissible and conclusive as a judgment *in rem*. The issue is not, in my opinion, whether the plaintiff has been guilty of conduct which is "infamous or disgraceful in a professional respect." It seems to me that the expression with which I have to deal is not only in form but in substance a different one. Without attempting to give an exclusive definition of "professional misconduct" I think it is clear that it has a more restricted meaning than the statutory expression, which latter might well include, and would on the evidence of the president of the council be held by the council to include, certain breaches of professional etiquette which could not, in my judgment, be properly described as professional misconduct. "Misconduct in the exercise of his profession"

would, I think, fairly express the meaning of “professional misconduct,” whereas the statutory phrase would include that misconduct and also misconduct as a member of the profession, which would be a different thing. If I am right in that view as to the issue before me, neither of these documents is properly admissible, and the arguments founded on the judgments of the Court of Appeal in *Allinson v. General Medical Council* [*ante*, page 153] and on the judgment of the Privy Council in *Harvey v. Regem* (*f*) need not be further considered. I would add that, in my opinion, even if the issue had been whether the plaintiff had been guilty of the conduct mentioned in the statute, the order would not have been admissible in proof of that fact, it being *res inter alios acta*. I can see no ground on which the report of the committee can be received in evidence. (His Lordship then referred to the facts properly proved or admitted as set out above, and continued :) On these facts, can I come to the conclusion that the plaintiff has been guilty of “professional misconduct” as alleged? The only act of his own is his becoming a shareholder in and a director of the company. This it is not contended amounted to misconduct. But, assuming that he ought to be treated as responsible for the acts of the company, what is there in those acts which can amount to professional misconduct, even if a wider meaning be given to the phrase than I think right? The employment of unregistered assistants is not, so far as I can see, contrary to any rule of professional conduct (*g*). I have read all the three pamphlets, and can see nothing in them except a puffing of American methods in comparison with those of other practitioners. Advertising is admittedly allowed in the profession (*g*), and I fail to see any professional misconduct in the publication of such pamphlets as these. In my opinion, the defendant has not succeeded in justifying the notices of June 28 and August 20 on the ground alleged in them.

But it was contended in argument that the plaintiff had been guilty of an act calculated to bring discredit upon or to injure the defendant or the partnership business. The business is carried on in the name of the defendant, the plaintiff's name not appearing at all. The order of May 24 would not necessarily bring discredit upon the defendant nor injure him or the business; but if it does, I hold that the defendant has not by any proper evidence proved that the plaintiff has been guilty of any act calculated to have that effect. The plaintiff is therefore entitled to the declaration asked for—that the notice of August 20 was of no effect, and that the partnership has not been deter-

[(*g*) See, as to this, Introduction, pages xlv and xlviii, *ante*.]

mined but is still subsisting, and to an injunction and to the costs of the action.

I desire to add that I express no opinion as to the propriety or otherwise of the order of the General Medical Council. They are the tribunal appointed by statute to determine the particular question before them. That question was different from the one I have to determine, and the materials before them were different from those I have before me.

HILL v. CLIFFORD
CLIFFORD v. TIMMS
CLIFFORD v. PHILLIPS
(IN THE COURT OF APPEAL)

1907. June 12.

[76 L. J. (Ch.) 627]

Partnership—Articles — Construction — “ Professional misconduct ”—Dentist—Order of General Medical Council erasing names from Register—Report of Dental Committee—Admissibility in evidence—Judgment in rem—Dentists Act, 1878 (41 & 42 Vict. c. 33), ss. 2, 3, 5, 13, 15.

Where two persons, being registered dentists, entered into three separate partnerships with three other persons for carrying on the profession of dentists under articles which provided respectively that if either partner should be guilty of professional misconduct, or of any act calculated to injure the partnership business, the other partners respectively might determine the partnerships by notice in writing, and the names of those two persons were erased from the Dentists Register by an order of the General Medical Council under the Dentists Act, 1878, upon the ground that, on facts found by the Dental Committee (on whose report the Council act), they had been proved guilty of conduct which was “ infamous or disgraceful in a “ professional respect ” within section 13 of the Act, they having appeared before the Council and having by their counsel admitted that they had been guilty of professional misconduct, and the other partners thereupon gave notices determining their respective partnerships, and actions were brought, in one of which the two persons were defendants and in the other two were plaintiffs, to determine the validity of such notices,—it was Held by COZENS-HARDY, M.R., and BUCKLEY, L.J., that the order of the General Medical Council was admissible as prima facie evidence of conduct which was

“infamous or disgraceful in a professional respect,” and, no rebutting evidence having been given, that the statutory misconduct was proved—SIR GORELL BARNES, P., doubting whether the order was admissible as evidence of the existence of professional misconduct, but considering that such misconduct had been proved by the admissions and evidence; and it was further Held by all the members of the COURT OF APPEAL that no distinction could be drawn between conduct which was disgraceful in a professional respect and professional misconduct within the meaning of the respective articles of partnership, and that consequently the notices were valid.

Decision of WARRINGTON, J., in Clifford v. Timms reversed.

Appeals from the decisions of WARRINGTON, J., in the above-named cases respectively.

The question for determination in each case was whether articles of partnership which had been separately entered into with Isidore Clifford and Ruby Edmund Clifford, or one of them, by the plaintiff in the first case and by the defendants in the other two cases, for the carrying on of the business of dentists, had been validly determined by notice based on the professional misconduct of the Cliffords. In each case the principal point was whether an order of the General Council of Medical Education and Registration of the United Kingdom, made under the Dentists Act, 1878, removing the names of the Cliffords from the Register of Dentists, on the ground that they had been guilty of conduct which was “infamous or disgraceful in a professional respect,” and also the report of the statutory committee upon which such order was founded, were to any and what extent admissible in evidence to prove professional misconduct on the part of the Cliffords.

The actions of *Clifford v. Timms* and *Clifford v. Phillips* were both heard by WARRINGTON, J., before the action of *Hill v. Clifford* but the appeal in the latter case came on first before the Court of Appeal and was argued on May 14 and 15.

The facts in *Hill v. Clifford* were as follows:—By articles of partnership dated October 18, 1905, and made between Isidore Clifford, Ruby Edmund Clifford, and Herbert Frederick Hill, who were all at that time registered dental practitioners, it was agreed that the profession or business of dentists should, as from June 30, 1905, be carried on by R. E. Clifford and H. F. Hill until September 30, 1913, determinable as therein mentioned, under the style of “Dr. H. F. Hill.”

By clause 8, it was provided that the business should be under the general management and control of H. F. Hill subject as thereafter mentioned, and that he should devote his whole

time and attention to the carrying on of the business; that R. E. Clifford should not be obliged to give any assistance in the business, and should be at liberty, subject as last aforesaid, to carry on or be engaged in any similar or other business, but that he should, during the continuance of that agreement, be at liberty at any time to enter the place where the business should from time to time be carried on and to take such part as he should think fit in the conduct of the business, and see and attend to any patient or patients of the business and open and deal with any letters addressed to the person in whose name the business should for the time be carried on.

Clause 16 provided that upon the death of R. E. Clifford before September 30, 1913 (if the partnership should not have been previously determined) his share in the goodwill and effects of the business should, as from the day of his death, belong to and be vested in Isidore Clifford if he should then be living, and the deed should, as from the day of the death of R. E. Clifford, be read and construed in the same manner in all respects as if the words "Isidore Clifford" were inserted therein in place of the words "R. E. Clifford." There were also provisions in the deed for the purchase of the share of either partner who should die during the partnership.

Clause 20 was as follows:—"If either of them the said R. E. Clifford or H. F. Hill or in case of the decease of the said R. E. Clifford in the lifetime of the said H. F. Hill the said Isidore Clifford shall at any time during the continuance of these presents be guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the business or be obstructive or contumacious therein or if he shall commit a breach of any of the clauses herein contained or act contrary to the good faith which ought to be observed between the said R. E. Clifford or Isidore Clifford and H. F. Hill or shall be adjudicated bankrupt or if a receiving order be made against him or he shall become incapable by reason of lunacy or otherwise to take his part in the management as the case may be of the business then and in either of such cases either of the other of them may by notice in writing given to the party so offending or becoming bankrupt or lunatic or against whom a receiving order be made as aforesaid . . . determine these presents as from the date of such notice then and in such case the provisions of these presents shall apply in the same manner in all respects as if the party so offending or becoming bankrupt or becoming incapable by lunacy or otherwise or against whom a receiving order be made had died on the day of such notice save and except that nothing shall be paid by

“ the continuing party in respect of the share of the expelled
“ party in the business other than his share of the surplus assets
“ of the business over the liabilities of the business and his share
“ of the profits of the business to the day of the determination
“ of these presents.”

The business contemplated by the deed was carried on between H. F. Hill and R. E. Clifford until June 19, 1906, when a notice in the following terms was given by Hill to R. E. Clifford :
“ Take notice that in consequence of your having been guilty
“ of professional misconduct or acts calculated to bring discredit
“ or injury upon the business in pursuance of clause 20 of an
“ Indenture dated October 18, 1905 and made between Isidore
“ Clifford of 55 St. James’s Street in the county of London
“ licentiate in dental surgery, of the first part, yourself of the
“ second part and myself of the third part, I hereby determine
“ as from this date the said Indenture.”

The Cliffords asserted that the notice was inoperative to determine the Indenture ; and on July 18, 1906, Hill commenced this action against them to obtain a declaration that the notice was a valid notice, and that the partnership was thereby duly determined, for the necessary accounts to be taken, and for other consequential relief.

The facts which were either proved or admitted at the trial were that the defendants and two other persons had joined in forming and were the principal shareholders in, and the only directors of, a company which was in 1887 incorporated under the Companies Acts under the name of the American Dental Institute, for the purpose (*inter alia*) of promoting the adoption of advanced American and other scientific methods of dental surgery, and which carried on a dental practice in London, Manchester and Liverpool ; that as such directors the defendants had been parties to the employment by the company of unregistered assistants to attend patients and perform dental operations upon them ; that some of these persons had on one or two occasions used the title of “ doctor ” ; and that the defendants had also been parties to the publication by the company of certain advertising pamphlets which were alleged to be of an objectionable character. On the ground of these acts complaint was made by the British Dental Association to the General Medical Council. The council, in exercise of their powers under the Dentists Act, 1878, on May 19, 1906, held an inquiry by a committee into the conduct of the defendants ; and, having considered the facts found in the report of the committee, the Council on May 24, 1906, made an order directing the registrar to erase from the Dentists Register the names of the defendants, on the

ground that it had been proved that they had been guilty of conduct which was "infamous or disgraceful in a professional respect" within section 13 of the Act.

The defendants had attended the proceedings before the committee and the General Council, and were on both occasions represented by counsel, who admitted before the General Council that the defendants had been guilty of professional misconduct.

The proceedings before the committee and their report and the order of the General Council were tendered in evidence by the plaintiff, and were by arrangement put in *de bene esse*; but at the trial WARRINGTON, J., held that they were inadmissible, and he dismissed the action with costs.

The plaintiff appealed.

Buckmaster, K.C., and *Ward Coldridge*, for the appellant.—The case made by the plaintiff is that the defendants have been guilty of professional misconduct or an act calculated to bring discredit on or injure the partnership business within the meaning of the articles, and for that purpose the report of the committee and the order made by the General Medical Council are admissible in evidence. The powers of the council are conferred by the Dentists Act, 1878, ss. 2, 3, 11, 12, and 13, and the character of their finding is *in rem* or *in statum*, and not *res inter alios acta* (*Kingston's (Duchess) Case (a)*, *Geyer v. Aquilar (b)*, *Philips v. Bury (c)*, *Rex v. Grundon (d)*, and *Harvey v. Reg. (e)*).

The jurisdiction of the General Medical Council is shown by *Allbutt v. General Medical Council* [*ante*, page 117], *Allinson v. General Medical Council* [*ante*, page 153] and *Leeson v. General Medical Council* [*ante*, page 125].

The defendants in this case appeared by counsel before the Medical Council and admitted the misconduct, and the appellant is entitled to use that admission as evidence (*Bauerman v. Radenius (f)*).

H. Terrell, K.C., and *A Houston*, for the respondents, the Cliffords.—Neither the report nor the finding is admissible in evidence against the defendants in this action. Each is *res inter alios acta*. The finding is not a judgment *in rem*. The order does not alter the *status* of the defendants at all. They can still act as dentists although they cannot describe themselves as dentists and cannot recover fees.

The order of the council is conclusive evidence of the fact that they have been removed from the register but it is not

(a) 2 Sm. L. C. (11th ed. 1903), 731; 20 How. St. Tr. 355.

(b) 7 Term Rep. 681. (c) 2 Term Rep. 346; Skin. 447.

(d) 1 Cowp. 315. (e) 70 L. J. (P. C.) 107; [1901] A. C. 601, 610.

(f) 7 Term Rep. 663.

evidence that they have been guilty of professional misconduct. The facts on which the order was founded were ascertained by a committee who had no power to take evidence on oath; and those findings of facts were conclusive for the purpose only of the removal of the names from the register (section 15 of the Act of 1878) and cannot be used in proceedings between the persons charged before the committee and a third person who was not before the committee at all.

(BUCKLEY, L.J., referred to the definition of judgment *in rem* in 2 Sm. L. C., at p. 752, and asked what was the *res* in the present case?)

The *res* here is merely that the defendants have been removed from the Dentists Register, not that they have committed an offence.

(Sir GORELL BARNES, P., referred to *R. v. Hartington Middle Quarter* (Inhabitants) (g).)

There an order of removal of children which was based upon the settlement of their parents was held to be conclusive as to the settlement of the parents in subsequent proceedings between the same parties, on the ground that the decision in each case necessarily depended upon the same facts. The proceedings in this case are not between the same persons who were parties to the order of the Medical Council. A conviction is *res inter alios acta*, and cannot be put in evidence in civil proceedings to prove a felony (*Leyman v. Latimer* (h), *Castrique v. Imrie* (i), and *Yates v. Kyffin-Taylor* (k)). In this latter case, Hall, V.-C., in the Palatine Court, deals with all the authorities on the subject.

(COZENS-HARDY, M.R., referred to *Hutton v. Ras Steam Shipping Co.* (l).)

In that case the action was for damages for dismissal and for wages which had been forfeited by a naval Court, and it was really an attempt to reverse the decision of the naval Court, which was conclusive under the Merchant Shipping Acts. The sentences of visitors of colleges removing officials or expelling members are conclusive only as to the fact of removal or expulsion (*Philips v. Bury* (c) and *Rex v. Grundon* (d)). These cases do not touch the present case. Under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 68, the verdict of a jury assessing damages in respect of land injuriously affected by public works is not conclusive evidence that the land has been injuriously

(g) 24 L. J. (M. C.) 98, 103; 4 E. & B. 780, 794.

(h) 47 L. J. (Ex.) 470; 3 Ex. D. 352.

(i) 39 L. J. (C. P.) 350, 357; L. R. 4 H. L. 414, 434.

(k) W. N. (1899), 141.

(l) 76 L. J. (K. B.) 562; [1907] 1 K. B. 834.

affected. *Waygood v. James* (m) and *Stevens v. Tillett* (n), which were decisions on election petitions, to some extent support the respondents. There the distinction was drawn between the certificate of the Judges under the Parliamentary Election Acts of 1868 and 1879, which has the conclusive effect of a judgment *in rem*, and their report which is not conclusive. The appellant, in order to succeed in this case, must show not merely that the order removing the names of the respondents operated *in rem* but also that the report upon which that order was made had that operation. In *Kingston's (Duchess) Case* (a) the question was whether the decree of a spiritual Court in a suit for jactitation of marriage was conclusive evidence, and it held that it was not a judgment *in rem*.

In *Harvey v. Reg.* (e) where a Court of competent jurisdiction had appointed an administrator in proceedings in lunacy, the finding that the person was of unsound mind was allowed to be used in subsequent proceedings between third parties only for the purpose of an interlocutory application, but not at the trial. With regard to the admission made before the Medical Council, an admission made in proceedings between A. and B. cannot be used in proceedings between A. and C. If the admission is by letter it can be used; but it would be very dangerous to allow an admission made by counsel in one case to be used in any other case. Before the Medical Council the respondents were bound by the findings of the committee, and the admission of such findings was not an admission that they were guilty of professional misconduct.

Buckmaster, K.C., in reply, referred to *Faulder v. Silk* (o), *Sergeson v. Sealey* (p) and Taylor on Evidence (1895 ed.), pp. 1102 and 1104.

Their Lordships reserved judgment until after the hearing of the appeals in *Clifford v. Timms* and *Clifford v. Phillips*.

On May 28 the appeals in these two cases came on for hearing. *Clifford v. Timms* [reported *ante*, page 264].

Buckmaster, K.C., and *E. F. Buckley*, for the appellant.

H. Terrell, K.C., and *A. Houston*, for the respondent, Isidore Clifford.

In *Clifford v. Phillips*, by a deed dated June 19, 1895, and made between Isidore Clifford and Ruby Clifford and Henry Allen Phillips a partnership was constituted between the parties in the profession or business of dentists, from January 1, 1895,

(m) 38 L. J. (C. P.) 195; L. R. 4 C. P. 361.

(n) 40 L. J. (C. P.) 58; L. R. 6 C. P. 147.

(o) 3 Campb. 126.

(p) 2 Atk. 412.

for the life of H. A. Phillips, subject to the stipulations therein contained. The business was to be carried on under the style or firm of Isidore Clifford.

Clause 27 provided that if the partnership should be dissolved by Phillips by reason of any injury done to the business through the public or private misconduct of Isidore Clifford, certain results were to follow. Clause 29 provided (amongst other things) that "if any of the partners be guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the other of the partners or either of them or the partnership business, the other partners shall be at liberty to give notice in writing of their intention to determine the partnership hereby created and thereupon the partnership shall be dissolved and wound up under the provisions of these presents."

On June 20, 1906, Phillips gave the Cliffords the following notice: "Referring to the Articles of Partnership dated June 19, 1895, and made between us I hereby give you notice that it is my intention forthwith to determine and dissolve the partnership between us you having been found by the General Medical Council to have been guilty of conduct which was infamous or disgraceful in a professional respect and your names having been removed from the Dentists Register by order of the Council, and I further give you notice pursuant to paragraph 27 of the same articles that such dissolution has been brought about through your conduct. Be good enough to acknowledge in writing the receipt of this notice."

On September 27, 1906, the Cliffords brought this action against Phillips claiming a declaration that the partnership between them had not been determined by the notice, but was still subsisting and undetermined, and for further consequential relief.

WARRINGTON, J., held that the plaintiffs were entitled to the relief claimed.

The defendant appealed.

Upjohn, K.C., and *E. Ford* for the appellant.

H. Terrell, K.C., and *A. Houston* for the respondents, the Cliffords.

The question as to the effect of the order of the General Council and the report of the committee was not argued either in this case or in *Clifford v. Timms*, the arguments in each case being directed merely to the difference in the facts and in the language of the material clauses in the respective partnership deeds.

Cur. adv. vult.

June 12. The following written judgments were delivered :—

COZENS-HARDY, M.R.—Although it will be necessary to deal separately with each of these three cases, there is one important point common to them all, which I think it desirable in the first instance to consider. Messrs. Isidore and Ruby Clifford, being registered dentists, entered into three separate partnerships with Hill, Phillips, and Timms for carrying on the profession or business of dentists, and the actions relate to the right of these three persons to determine the several partnerships on the ground that the Cliffords have, under the provisions of the Dentists Act, 1878, been found guilty of conduct which was “infamous or disgraceful in a professional respect” and have thereupon been removed from the Register of Dentists. The question arises whether the order of the General Medical Council, acting under the powers conferred by the Medical Act, 1858, and the Dentists Act, 1878, is to any and what extent evidence of professional misconduct on the part of the Cliffords. Now the Medical Council is the body to which, and to which alone, is confided the power, and with the power the duty, of altering the *status* of a dentist by removing his name from the register. The language of section 13 of the Act of 1878 is clear. By section 15 the facts are to be ascertained by a committee of the Council, and the report of the committee is made conclusive as to the facts for the purpose of the exercise of the power by the council of erasing a name from the register. The consequences of removal of a name are set forth in sections 3 and 5 of the Act. The person whose name is so removed cannot use the name or title of “dentist” or “dental practitioner” nor can he recover any fee or charge for the performance of any dental operation or for dental attendance or advice. It is contended on behalf of the Cliffords that the order of the Medical Council is *res inter alios acta* and not admissible in evidence to prove that they were guilty of professional misconduct. Mr. Justice WARRINGTON has adopted this contention; but with all respect to the learned Judge, I cannot agree with this view. I think the order is admissible as evidence of the existence of conduct which was “infamous or disgraceful in a professional respect,” the proof of which fact was essential to the validity of the order of the General Council—see *Harvey v. Reg. (e)*. It is by no means easy to find a satisfactory definition of a judgment *in rem*. In Smith’s Leading Cases it is defined as “an adjudication pronounced (as indeed its name denotes) upon the *status* of some particular subject-matter, “by a tribunal having competent authority for that purpose.” There are, however, two classes of judgments *in rem*, one of which is conclusive against all the world, and the other of which

is not conclusive, though admissible, in any other proceedings. Instances of the former class are adjudications by a competent Court as to the existence of a marriage, or a condemnation of a prize in the Admiralty Court. A familiar instance of the second is an inquisition in lunacy, which has always been allowed to be read in a subsequent suit between third parties as evidence of the lunacy, though it is not conclusive and may be traversed; see *Sergeson v. Sealey* (p) and *Faulder v. Silk* (o). A recent, and I think instructive, instance of the application of this doctrine is to be found in *Van Grutten v. Foxwell* (q). The case is not reported on this point, although the point is mentioned. A disentailing deed was executed by Mary Hartley in 1835. By an inquisition taken in 1845 she was found to have been insane from 1833. At the trial of the action before Mr. Justice Vaughan Williams (see Case on Appeal to the House of Lords, p. 103) it was argued that it was a finding *in rem*, a finding affecting the *status* of Mary Hartley, and that it was conclusive as against all the world to establish the invalidity of the deed. But the learned Judge said: "That clearly "was to go much too far. It is not conclusive as against "strangers. At the same time it is *prima facie* evidence against "strangers." And he held the deed of no effect. The case went to the Court of Appeal. Lord Justice Lopes said (*Ibid.* p. 127): "The inquisition affords no doubt *prima facie*, but "not conclusive, evidence of Mary's insanity in October, 1833, "anterior to the execution of the disentailing deed, evidence "which should be acted upon unless there is evidence the other "way." And Lord Justice Rigby said (*Ibid.* p. 136): "The "inquisition of 1843 is evidence that Mary was insane as from "October, 1833, though, so far from being conclusive, it is not "even strong evidence of her being insane at the date of the dis- "entailing deed if a contrary case can be made out." And they held that there was sufficient evidence to the contrary and that the disentailing deed was valid. In my opinion the order of the General Council should be treated on the same footing as an inquisition. Unless and until evidence to the contrary is given, the order suffices to prove that the Cliffords were guilty of statutory misconduct. No evidence was given by the Cliffords to rebut this *prima facie* evidence. I may add that I doubt whether it is competent to any Court to review a declaration by the General Council that an act of a particular kind is "disgraceful conduct "in a professional respect," even though it may be competent to review the decision that a certain individual has committed an act of that particular kind. I prefer to base my judgment on this

general principle, although in the present case it might be sufficient to say that the Cliffords, by the mouth of their counsel, speaking in their presence in the most formal manner, admitted "that they have been guilty, as has been found by the committee, of offences of professional misconduct," and promised not to repeat these offences.

It remains to consider the several cases. Hill's partnership was created by a deed dated October 18, 1905, and it contained in clause 20 a provision that if any partner should at any time during the continuance of the partnership be "guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the business," or should "become incapable by reason of lunacy or otherwise to take his part in the management as the case may be of the business," then either of the other of them might by notice in writing determine the partnership as from the date of such notice. Under the earlier clauses of the deed, although Hill was the only partner who was bound to devote his time to carrying on the profession or business of dentists, the other partner had a right to take part in it. Ruby Clifford was in the first instance the only partner with Hill, but there were provisions under which Isidore Clifford could in certain events take his place. Hill shortly after the decision of the council on May 24, 1906, gave notice in writing to determine the partnership, and brought an action for a declaration that the notice was valid and that the partnership was determined, and for consequential relief. In my opinion the notice was valid. I think the Cliffords were guilty of "professional misconduct" within the meaning of clause 20, and that it is idle for a man who, in the language of section 13 of the Act of 1878, has been guilty of "disgraceful conduct in a professional respect," to contend that he has not been guilty of "professional misconduct." I think, further, that, by reason of the removal of their names from the register, the Cliffords have become incapable of taking part in the management of the business.

The partnership with Phillips was created by a deed dated June 19, 1895. The business was by clause 2 to be carried on under the style or firm of "Isidore Clifford." By clause 29 it was provided that if any of the partners be "guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the other of the partners or either of them, or the partnership business, the other partners shall be at liberty to give notice in writing of their intention to determine the partnership hereby created, and thereupon the partnership shall be dissolved and wound up." The language of this clause is very loose, but taken together with clause 27, which

in terms assumes, or rather asserts, a right in Phillips to dissolve the partnership by notice by reason of injury done to the business through the public or private misconduct of Isidore Clifford, I think it is clear that it was competent to Phillips to give the notice of dissolution which he did give on June 20, 1906, dissolving the partnership. In my view all the considerations as to professional misconduct which arose in Hill's case apply to this case. But there is a further peculiarity which ought not to be passed over. Phillips is not a registered dentist, and I infer from a statement made by his counsel in the Court below that he is not qualified to be put on the register. Under these circumstances it seems to me impossible to allow the two Cliffords, who are not on the register or qualified to be put on the register, to maintain an action against Phillips, who is also not on the register, for the purpose of securing the continuation of the professional business of dentists upon the terms of the partnership articles. The whole foundation or substratum of the partnership is gone. I doubt whether it is practicable to carry on the partnership business of dentists without incurring a penalty under the Dentists Act, 1878, and if so, the partnership under present circumstances could not escape the taint of illegality.

The partnership with Timms was created by a deed dated October 2, 1899. Clause 23 is substantially the same as the corresponding clause in Hill's case, and I do not think it necessary to say anything more with reference to it. Timms gave a notice of dissolution which, for the reasons above stated, I think was valid. The result is that in my opinion the judgment appealed against must in each case be reversed. Judgment in Hill's action must be given for the relief asked by the claim, and the two actions brought by the Cliffords against Phillips and Timms must be dismissed. The Cliffords must pay the costs in the Court below and in this Court of each action.

SIR GORELL BARNES, PRESIDENT.—These are appeals in three cases decided by Mr. Justice WARRINGTON, the principal points in which are substantially the same, though there are certain minor points of difference with which I will deal later on in this judgment. In each case the question for determination is whether articles of partnership have been validly determined, and in each case one of the questions is as to the admissibility in evidence on behalf of the party seeking to determine the articles of partnership of certain proceedings before the General Council of Medical Education and Registration of the United Kingdom. The appeal in the case of *Hill v. Clifford* came on before this Court first, though the other two cases were heard before that case by Mr. Justice WARRINGTON; but as the case of

Hill v. Clifford was argued here at considerable length and all the authorities which counsel desired to refer to were then cited, I think it will be convenient to deal with that case first, and afterwards refer to the minor differences which exist between that case and the other two. [His Lordship stated the facts in *Hill v. Clifford* and continued :]

If the proceedings before the Dental Committee of the General Council and before the General Council were admissible in evidence, the plaintiff contended that the decision of the council that the defendants had been proved to have been guilty of conduct which was infamous or disgraceful in a professional respect established that the defendants had been guilty of professional misconduct or of acts which were calculated to bring discredit upon or injure the business aforesaid within the meaning of clause 20 of the articles of partnership, and the ground of this contention was that the decision of the General Council was equivalent to a judgment *in rem* upon the *status* of the parties affected by it, and was conclusive proof of the facts adjudicated upon. The objections to the admissibility of these proceedings were, First, that they were *res inter alios acta*; and, Secondly, that the decision of the Medical Council, even if admissible, did not determine the issue raised in this case, as the terms in which the decision was given, which is in accordance with the language used in section 13 of the Dentists Act, 1878, was not a finding of professional misconduct against the defendants within the meaning of the terms of the deed of partnership.

Mr. Justice WARRINGTON supported both these objections, for he stated in his judgment that the issue he had to try was not the issue which the General Medical Council had to try when they were dealing with the case under the Act, but was whether these gentlemen had been guilty of professional misconduct, not conduct which is described by the words above mentioned in the Act; and, further, that in his opinion neither the report of the committee, the minutes of the committee, the evidence given before the committee, nor the order of the General Council could be evidence in the present case in support of the allegation that the defendants had been guilty of professional misconduct.

With regard to the second objection made by the defendants, it appears to me that, if the decision of the General Council was admissible, the finding that the defendants had been guilty of conduct which was infamous or disgraceful in a professional respect was substantially a finding that they had been guilty of professional misconduct. I find myself unable to discern any distinction of substance between the two forms of expression;

they appear to me to mean substantially the same thing, and any attempt to differentiate between them is an attempt to establish a distinction without a difference.

The first objection raised the very difficult question which was most fully and ably argued before us—viz., whether or not the proceedings aforesaid were admissible for the purpose of proving the fact of professional misconduct on the part of the defendants; but after considerable reflection I do not think it is necessary to determine that question in this case. For in my opinion the case may be disposed of upon the facts admitted or proved at the trial without using the report or order aforesaid for the purpose of proving the facts just referred to. As, however, the question was so much pressed for decision, I think it desirable to make some observations upon it which show that I am not satisfied that the arguments of the appellant completely disposed of the difficulties of the matter.

The statute of 1878 constituted the General Council the proper tribunal to investigate the professional conduct of persons registered under the Act, and imposed a statutory duty upon that council, upon the application of any of the medical authorities, to cause an inquiry to be made into the case of a person alleged to be liable to have his name erased under section 13 of the Act, and on proof of a conviction as mentioned in the said section, or that a registered person had been guilty of any infamous or disgraceful conduct in a professional respect, to cause the name of such person to be erased from the register; and section 15, as already noticed, provided the means of ascertaining the facts to be placed before the General Council, and enacted that the report of the committee ascertaining the facts should be conclusive as to the facts for the purpose of the exercise of those powers by the General Council. The Legislature has thought fit to entrust these powers to this special tribunal, and it seems a most appropriate tribunal for the investigation of such a matter as that contemplated by the section to which I have referred—a tribunal more likely to be familiar with the matters which might be considered as amounting to professional misconduct, and more able to properly consider and deal with such matters than the ordinary tribunals of the country, consisting of a judge or of a judge and jury. Such a decision as that given by the council, erasing the name of a registered practitioner from the register, has a two-fold effect. It has the effect of preventing the person whose name has been erased from taking or using the name or title of “dentist” or of “dental practitioner,” or of any description implying that he is registered, or is a person specially qualified to practise dentistry, and of

preventing him from recovering any fee or charge in any Court for the performance of any dental operation or for any dental attendance or advice, and thus alters his professional *status*.

Before considering whether the order of the council was admissible in evidence, I may say that it would not appear to be necessary for the determination of this case to decide whether or not the report of the committee was also admissible, because the order or decision itself states sufficient for the purpose of the case. But if the order was admissible possibly the report was, as forming part of the order or decision in which the report is expressly referred to as finding the facts upon which the council acted.

The question with regard to the order of the council, so far as using it to prove the fact of professional misconduct by the defendants is concerned, is one of very considerable difficulty, and depends upon whether it can be considered as in the nature of a judgment *in rem*, and even if it can, the question arises for what purpose it may be used. A judgment *in rem* has been defined to be an adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose ; and there is authority for the proposition that in certain judgments *in rem* the judgment or order is conclusive against all the world, not merely for the immediate purpose thereof, but as to the existence of the ground on which the Court proposes to decide—see the cases collected under the *Duchess of Kingston's Case (a)*. As an instance of this may be given a sentence of condemnation as prize in a Court of Admiralty. The authorities, however, seem to me only to deal with the use or effect of the judgment on questions upon which the judgment is conclusive for its proper purpose or object, and not with regard to other issues, though in some exceptional cases such a judgment would seem to have been admitted within limits for a somewhat wider purpose.

Then would this order fall within that class of judgment or, as in some cases—for instance in the case of inquisitions—would it be admissible in evidence, and if admissible would it be admissible to prove anything more than the fact that the names had been erased ? I doubt very much whether the order could be held to be conclusive evidence in this case of the grounds upon which the council acted. I may give an instance, arising in cases with which I was at one time familiar, of an order which, in its effect, the order in question somewhat resembles, viz., the order of a Court holding a formal investigation into a shipping casualty under the Merchant Shipping Acts. If, in such a case, the Court should find that the loss or abandonment of or serious

damage to a ship or loss of life has been caused by the wrongful act or default of a master, mate, or engineer, it may cancel or suspend his certificate—see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 470. Numerous cases have been dealt with under this Act and the Acts which it replaces, and in many cases actions have been brought by cargo owners and others against the shipowners in respect of the loss; but it has never so far as I am aware been suggested that the decision of the Court cancelling or suspending an officer's certificate could be used either as conclusive or any evidence against the owners to prove the loss and that it was caused by the officer's act or default, although his *status* as an officer is altered by the order, and although the order would no doubt be admissible upon a question as to what was the *status* of the officer, and would probably be conclusive upon the point. Nor have I ever heard it suggested that such a decision could be used against a captain whose certificate had been cancelled or suspended if he had been in a position to be sued for the loss.

It would not be necessary, however, to decide whether the order was conclusive evidence even as against the defendants and of what and to what extent it was conclusive. It would probably be sufficient to determine whether the order was admissible in evidence in the case, because no evidence was given in answer to the plaintiff's case. Upon this point the cases upon inquisitions have a bearing, where it has been held that they are admissible in evidence, but may be traversed—see *Sergeson v. Sealey* (p); *In re Parry, ex parte Duke of Beaufort* (r).

If the order should be admissible, the question then would seem to be for what purpose and to what extent would it be admissible in this case? Now I think upon this it must be borne in mind that the case is one relating to professional men who are subject to the special and peculiar jurisdiction of the Medical Council, and have entered into partnership with each other to carry on a profession in which they are subject to this jurisdiction, and liable to have their power to continue to carry on that profession determined by the action of the council if they act in a manner which renders them liable to have their names erased from the register. That the order was admissible in evidence for some purposes for which it may be required in this case is, in my opinion, clear. It was admissible as evidence, and conclusive evidence, of the fact that the defendants' names had been erased by the order of the council. I think, further, it might be admissible against the defendants to show the grounds upon which it was made, as without one or other of the grounds specified in the

Act the council had no jurisdiction to make the order, and I should doubt whether it would be a good order by such a tribunal unless it showed the grounds of making it. So far, however, the proof of the order and its admissibility on these points would not seem to be material upon the issue of misconduct in fact which the plaintiff required to establish.

Then a much more difficult question arises as to whether the order would be admissible as evidence of the truth of the grounds upon which the decision of the council was given. If the judgment of Lord Lindley in *Harvey v. Reg. (e)* is applicable to such a case as the present, it would be an authority for holding that the order was *prima facie* evidence of the truth of the facts; but that was a peculiar case, in which it may be said that the proceedings in which the orders were tendered were of an interlocutory character, as they merely related to the question whether the defendant was prevented from showing cause against a notice for making a certain decree absolute. I have been unable to satisfy myself that the order in the present case could be tendered as evidence against the defendants of the truth of the facts. But when the nature of the powers conferred upon the council and the position of the parties in their profession are considered, it seems to me that the order might possibly be evidence of this—that from the facts before them the council had found that the defendants had been guilty of conduct which was infamous or disgraceful in a professional respect; and, although the ordinary Courts may be competent to consider whether the facts were true, it seems to me that, having regard to the terms of the Act, it is extremely doubtful whether it would be competent for those Courts to hold that the special tribunal created by the Act had formed an erroneous opinion that the acts imputed to the defendants, and proved before them by the report of the committee, amounted to such conduct as aforesaid. If that could be done, then the remarkable position would be reached that the tribunal which is constituted to deal with cases of professional misconduct and to erase names for such conduct, and from whose decision there is no appeal, might be considered to have arrived at an erroneous conclusion by another tribunal which had not the same capacity of judging of what was professional misconduct as the former, and would require to be assisted by evidence of witnesses unless the finding of the council is to be treated as the best evidence of what amounts to professional misconduct. Here substantially the same facts which were before the council have been proved or admitted, and yet upon the issue of professional misconduct on the part of the defendants the Court is asked to say that these facts do not show

professional misconduct, although the Medical Council have held that they do.

The foregoing observations I think are also to some extent applicable to the point raised as to the right of the plaintiff to determine the partnership if the defendants should be guilty of any act calculated to bring discredit upon or injure the business.

There is, however, as I have already noticed, another purpose for which the order appears to me to be clearly admissible, and that is to prove that the defendants' names have been erased from the register by the order of the council; the result of which is that the defendants can no longer carry on the profession or business of dentists within the meaning of the deed, and in my opinion have become incapable of taking any part in the management thereof, and this result would justify the plaintiff in giving the notice to determine the partnership in pursuance of that part of clause 20 which is applicable in this event; and this is important to the plaintiff, because if he continued the partnership he might find himself in peril under the provisions of the Act for continuing in association with unregistered practitioners.

I now pass to another part of the case which does not rest upon the question of the admissibility of the report or order. The defendants were represented by counsel before the Dental Committee, and were represented again by counsel, and themselves were present, at the consideration of the report of the Dental Committee by the General Medical Council, and the shorthand notes of what took place before the committee and the council were tendered before Mr. Justice WARRINGTON and put in *de bene esse*, but ultimately held by the learned Judge not to be admissible. The question was raised in the discussion upon this appeal as to whether the statements made on behalf of the defendants by their counsel before the committee and before the council were admissible in evidence, those statements being shown in the shorthand note. In my opinion these statements or declarations were admissible against the defendants. For what was the position? Certain charges were being made against the defendants which they were called upon to answer if they desired to do so. Those charges were being investigated by the committee, and afterwards were being considered by the council; and it appears to me that at any rate one may go so far as this—that if a charge is made against persons in the position of the defendants, and they have an opportunity of answering that charge or of disputing it, and they themselves make statements in connection with the charge which it may be said amount to an admission of the conduct with which they are charged, their own statements would be clearly admissible against them; and

in my opinion it makes no difference that the statements were not actually made by the persons charged, but were made by counsel instructed on their behalf to represent them. This applies most strongly to the statements made before the council in the presence of the persons charged with the matters which formed the subject of the investigation. [His Lordship then read the admissions above referred to, and continued :]

The course taken by the defendants was tantamount to a plea of guilty, and I think that they must be taken to have admitted the charges against them. It has been held that a record of judgment in a criminal case upon a plea of guilty is admissible in a civil action against the party as a solemn judicial confession of the fact—see Phillips on Evidence (10th ed.), vol. II, p. 29, where he cites a case before Mr. Baron Wood deciding the point.

Apart from the question of the admissibility of the order of the General Council, upon the evidence before Mr. Justice WARRINGTON, consisting of the admissions made at the trial, the answers to interrogatories, and the admissions made on behalf of the defendants before the committee and council, I cannot agree with the learned Judge, and if it is necessary for the Court to arrive at a conclusion of fact, I consider that the plaintiff has succeeded in proving his case and justifying his notice on the ground alleged in it.

There is a further point in this and the other two cases which is worth referring to, though it is not necessary to give any positive opinion upon it. By section 34 of the Partnership Act, 1890, a partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership. As the Cliffords have ceased to be registered or entitled to be registered under the Act, and can no longer call themselves dentists and are liable to penalties if they do, it may perhaps be said that an event has happened which makes it unlawful for the business of the firm to be carried on by them, and that this may be so even though the defendants' names do not appear in the style of the firm ; for the profession or business is to be carried on under the style of Dr. H. F. Hill, and is to be that of dentists ; and if they remained partners in that firm they would be using the title of dentists within the meaning of the Act. It is idle to say that the partners can still do work of the kind performed by dentists without calling themselves dentists. The deed is a deed for a partnership as dentists, which cannot really be carried on any longer.

I am of opinion that the appeal in this case should be allowed,

and that the plaintiff should have judgment for the necessary relief.

(His Lordship then proceeded to state the facts in *Clifford v. Timms* and *Clifford v. Phillips*, and came to the conclusion, practically for the reasons above mentioned by him and which in effect coincided with those of the MASTER OF THE ROLLS, that the appeals in both cases should be allowed.)

BUCKLEY, L.J. I also am of opinion that this appeal must be allowed. I should add nothing but that, inasmuch as we are differing from the learned Judge, I ought to give my reasons in my own words.

There is a short ground arising upon the construction of the agreement sufficient in itself, I think, to determine this appeal. The deed of October 18, 1905, provides (clause 1) that the profession or business of dentists shall be carried on by Ruby Clifford and Hill, and (clause 2) the style is to be "Dr. H. F. Hill." By clause 8 Ruby Clifford is at liberty to take such part as he thinks fit in the conduct of the business and to see and attend to any patient or patients of the business. Clause 20 then provides that if Ruby Clifford shall during the continuance of these presents "become incapable by reason of lunacy or otherwise to take "his part in the management as the case may be of the business" Hill may by notice in writing determine these presents. The words "as the case may be" here mean, I think, take "such "part in the management as under the provisions of these "presents are appropriate to his case."

The proceedings before the General Medical Council have resulted in an order the effect of which is that under section 3 of the Act of 1878 Ruby Clifford is not entitled to take or use the name or title of dentist, and that under section 5 he cannot recover any fee or charge for the performance of any dental operation. He has thus become incapable of being and acting as a partner in the profession or business of dentists which is the subject of the partnership carried on under the style of "Dr. "H. F. Hill." The words that I have quoted from clause 20 in my opinion apply to his case. The notice which the plaintiff gave was, I think, authorised by the words "become incapable "to take his part in the management as the case may be of the "business." Apart, moreover, from those particular words of clause 20, the facts are that the proper authority controlling his profession have made an order the result of which is that he can no longer under the partnership style carry on the partnership business or see or attend to patients. If, therefore, the partnership deed remains in operation, Hill is placed in this position—that under clause 8 he is bound to allow Ruby Clifford to see patients on the partnership premises under the partnership style,

with the result that Hill will be guilty of professional misconduct by acting in partnership with a person who is by the Act of Parliament precluded from taking or using the name or title of dentist, and by acting in breach of the Resolution of the General Medical Council of November 24, 1892 (s). For after the order of the Medical Council Ruby Clifford is neither registered nor qualified to be registered under the Dentists Act, 1878.

Further, in addition to and apart from these grounds, I am unable to agree in the view which the learned judge took in the following matters. The Act of 1878 speaks in section 13 of "infamous or disgraceful conduct in a professional respect." The General Medical Council, to whom is committed by the Act of Parliament the exclusive right and duty of adjudicating upon that subject-matter, have found the defendant guilty of such conduct. The partnership deed speaks of "professional "misconduct." Conduct infamous or disgraceful in a professional respect must, as it seems to me, be professional misconduct. I fail to understand how a person can be innocent of misconducting himself professionally when he has been guilty of infamous or disgraceful conduct in a professional respect. Further, I am unable to agree with the learned judge in thinking that materials which the plaintiff tendered in evidence were inadmissible. The order of the General Medical Council is unquestionably admissible, and is, indeed, conclusive upon the question whether Ruby Clifford's name has been erased from the register. It is in my opinion also admissible to show the grounds upon which his name was erased. This is not the same as saying that it is evidence that those grounds were truly alleged. The Act provides, section 15, that the report of the council shall be conclusive as to the facts for the purpose of the exercise of the power by the General Medical Council. The order may, I think, be tendered in evidence for at least two purposes—first, to show its own existence; and, secondly, to show the grounds on which it was made. The next stage is no doubt more difficult, namely, whether it is admissible as evidence of the truth of those facts. It is no doubt not conclusive as to their truth. But it is, I think, admissible as evidence of their truth. The order of the General Council is a proceeding *in rem* in that it affects the *status* of Ruby Clifford in a matter which, for the purpose of this agreement, is vital, namely, whether he has the *status* of a registered dentist. Lord Lindley's words in *Harvey v. Reg. (e)* are, I think, appropriate to this state of facts. The passage in Taylor on Evidence (10th ed.), s.s. 1674 *et seq.*, and the cases there quoted, go to show that

[*(s)* For this resolution see Introduction, page xlvi, *ante.*]

certain judgments *in rem* which are not conclusive evidence are yet admissible in evidence within proper limits. The present case, however, does not stop at this point. The counsel who appeared for Ruby Clifford before the General Medical Council made certain admissions. The learned judge has excluded them. They were made by counsel in the presence of the party, and of course with a full sense of responsibility, and have in my opinion the same weight as if made by the party himself. An admission is of course not conclusive, but is admissible in evidence against the party who made it. Counsel, after admitting certain facts, went on to admit that Ruby Clifford was guilty, as the General Medical Council had found him to be, and he elected to call no witnesses. In this present proceeding it would, I think, notwithstanding the order of the General Medical Council, have been competent to Ruby Clifford to have asserted and have proved if he could that he had not been guilty of professional misconduct, but he has adduced no evidence at all for that purpose. The plaintiff has, by the use of materials which I think were open to him, established the fact that Clifford was so guilty. For these reasons I think that this appeal must succeed, and the order below be discharged, substituting a declaration that the plaintiff's notice was a valid notice with proper consequential relief, including a declaration that Isidore is not entitled to be substituted for Ruby, and an order that the defendants pay the costs up to and including the trial and the costs of this appeal.

(His Lordship then dealt with *Clifford v. Timms* and *Clifford v. Phillips*, and, having referred to the points of difference in the respective partnership deeds in these cases, he held in effect, for the reasons assigned by him in *Hill v. Clifford*, that the appeals succeeded.)

Appeals allowed.

CLIFFORD *v.* TIMMS
CLIFFORD *v.* PHILLIPS
(IN THE HOUSE OF LORDS)

1907. Nov. 20, 21.

[77 L. J. (Ch.) 91]

Dentist—Partnership—Right of partner to dissolution—Professional misconduct—Dentists Act, 1878 (41 & 42 Vict. c. 33), ss. 13, 14, and 15.

The publication of statements by a dentist expressed in terms

of profuse self-praise and of disparagement of other practitioners held to constitute "professional misconduct" such as to justify a partner, under the terms of a partnership deed, in demanding the dissolution of the partnership.

Decision of the COURT OF APPEAL affirmed.

CLIFFORD v. TIMMS

Appeal from an order of the Court of Appeal (COZENS-HARDY, M.R., Sir GORELL-BARNES, P., and BUCKLEY, L.J.) discharging a judgment of WARRINGTON, J.

The appellant and respondent were both registered dentists under the Dentists Act, 1878, and became partners under an indenture of October 2, 1899. By clause 23 of the partnership deed, if either partner should "be guilty of professional misconduct or any act which is calculated to bring discredit upon "or injure the other partner or the partnership business, the "other partner shall be at liberty to give notice in writing of "his intention to determine the partnership hereby created, "and thereupon the partnership shall be dissolved under the "provisions of these presents."

The action was brought for a declaration that the partnership had not been dissolved. On June 28, 1906, the respondent served the appellant with notice of his intention to dissolve the partnership on the ground that the appellant had been guilty of professional misconduct within the meaning of clause 23. The appellant denied the charge; and some negotiations having taken place between the parties, the respondent served on the appellant a second notice of dissolution dated August 20, 1906, in similar terms to the first, and a notice dated August 21, 1906, of the appointment of an arbitrator to determine the amount of compensation to be paid by the respondent to the appellant under clauses 23 and 25 of the deed.

The facts alleged by the respondent in his defence as justifying the giving of the notices were the following—namely that (a) the appellant and three other persons, named respectively Ruby Edmund Clifford, Walter Clifford, and Stanley Clifford, all of whom were then duly registered dental practitioners, joined in forming a limited company named the American Dental Institute (Limited) (hereinafter referred to as "the company") incorporated under the Companies Acts for the purpose (*inter alia*) of promoting the adoption of advanced American and other scientific methods of dental surgery. The company carried on dental practice at divers addresses in London, Manchester, and Liverpool. The appellant was one of the principal shareholders

in and a director of the company ; and (b) as a director of the company the appellant was a party to the employment by the company of unregistered assistants (named) (all using the title of doctor) to attend patients and perform dental operations upon them, and to the systematic and extensive advertisement of the company by pamphlets of an objectionable character claiming superiority over other practitioners and depreciatory of them ; and (c) as a director of the company the appellant was a party to the publication in a periodical styled the *Review of Reviews* of an article referring to an interview with one of the directors of the company, and containing scandalous and highly objectionable remarks with regard to English dentists and dentistry ; and that (d) the Dental Committee of the General Medical Council of Medical Education and Registration of the United Kingdom, having inquired into the conduct of the appellant in respect of the matters above mentioned, duly reported to the council, and at a meeting of the council held on May 24, 1906, the council, after due deliberation and consideration of the report of the committee and acting under the powers conferred on the council by the Dentists Act, 1878, found that on the facts stated in the said report it had been proved that the appellant had been guilty of conduct " which is infamous or disgraceful in a professional " respect," and directed the registrar of the council to erase the name of the appellant from the Dentists Register, and the appellant's name was accordingly erased from such register ; and that (e) the appellant was present at the said meeting of the council and was represented by counsel, who, prior to the aforesaid finding of the council, and acting upon the instructions of the appellant, expressed the profound regret of the appellant that he had been guilty as found by the committee of professional misconduct.

It was, among other things, proved or admitted that £100 was, with the appellant's knowledge, paid out of the funds of the company to the proprietors of the *Review of Reviews*. The following was the most important paragraph in the article : " No scandal.— " Another point that has recommended the American system " to many patients is the fact that there is always a trained maid " in the operating-room. Whether the patient is a man or " woman, she is always present. It is handy and convenient " for the purposes of the operator, who has ready and skilful " hands to place whatever instrument he requires at once in his " grasp. It saves time, it gives confidence to the patient, and, " above everything else, it entirely relieves us from any danger of " scandal. In many English operating-rooms the dentist and a " lady patient will be closeted together on terms of close physical " intimacy for an hour at a time, and although in a hundred cases

“no mischief ensues, in the hundred and first it may be otherwise. It has been otherwise, as everyone knows who has any acquaintance with the profession; but it is impossible for any scandal to arise in the surgeries of the American Dental Institute.”

WARRINGTON, J., held that the order of the General Medical Council was inadmissible as evidence of professional misconduct.

Sir R. B. Finlay, K.C., and *H. Terrell, K.C.* (*Arthur Houston* with them), for the appellant.

Buckmaster, K.C., and *E. F. Buckley*, for the respondent, were not heard.

THE LORD CHANCELLOR (LORD LOREBURN).—I am of opinion that this appeal must be dismissed.

The question is whether a particular dental practitioner has been guilty of professional misconduct and thus enabled his partner to cancel the arrangement between them. I do not think it in the least necessary to enter upon the legal question, interesting as it may be, which was discussed so much in the Court of Appeal. It seems to me to be a matter of indifference whether the order made by the General Medical Council be admitted in evidence or be excluded. What seems to me quite clear is this—that the form of advertisement which was sanctioned by the gentleman in question amounted in the circumstances to professional misconduct. I will not dwell upon the case. There was profuse advertisement in every form of self-praise and self-commendation on the part of this company and of those who carried on business under its authority.

For the present purpose it is enough to say that there were two particular advertisements which I consider to be thoroughly discreditable, and to amount to professional misconduct of a serious and inexcusable kind. One of them was that which related to a suggestion that most, or nearly all, other dental practitioners omitted the necessary precaution of sterilising their instruments, whereas those who carried on the business of this company were careful not to omit that precaution. Now that was a peculiarly dangerous form of disparagement levelled against other practitioners, because it was not levelled against any one in particular, and therefore the falsity of it could not have been vindicated in any action. The second instance, which I deprecate still more strongly, is the report of an interview which appeared in the *Review of Reviews*, and which contained the undisguised suggestion that in cases—I will not apply strictly the numerical test suggested in the *Review*—but in cases of English dentists it was at all events a not uncommon thing that disgraceful advantage should be taken by the operator, in the

ease of a woman, of the absence of some other woman to guard her honour. I can see nothing that can justify anything of that kind. It has all the elements of disgraceful imputation—it is so general that it cannot be denied, that it cannot be proved, and that it cannot be made the subject of investigation; yet it suggests to those who are sensitive about the honour of others who belong to them the most powerful motive to avoid other establishments and to seek relief from those who are engaged by this company, with the object and with the result of pecuniary profit. For my part, if this be not disgraceful conduct, if it be not professional misconduct, I know not what the terms mean.

EARL OF HALSBURY.—I entirely agree.

LORD MACNAGHTEN.—I agree.

LORD ATKINSON.—I agree.

Appeal dismissed (a).

CLIFFORD v. PHILLIPS

This appeal raised the same question as the foregoing.

Sir R. B. Finlay, K.C., and Arthur Houston (H. Terrell, K.C., with them), for the appellants.

Upjohn, K.C., and Edward Ford, for the respondent, were not heard.

THE LORD CHANCELLOR (LORD LOREBURN).—So far as the merits are concerned in this case, as regards the question of professional misconduct, there is no distinction between it and the ease which your Lordships decided yesterday. Separate points are raised independently of the merits. The first point is that the notice does not correctly express the ground upon which the notice is based. That is true, but then the deed does not require the reason to be stated in the notice at all.

The second point is that the words “the other partners shall “be at liberty to give notice” do not apply, because here only one partner seeks to give notice. The answer is that the clause is certainly ungrammatical; but whichever construction is adopted the clause is equally ungrammatical. When the context in clause 29 is looked at, it assumes that the right of giving notice arises when two of the three partners have been guilty of professional misconduct.

In my opinion the fair construction, upon reading the whole clause, is that put upon it by the Court of Appeal.

(a) On 28th November 1911 the General Medical Council restored the names of the Messrs. Clifford to the Dentists Register.

EARL OF HALSBURY.—I agree.

LORD MACNAGHTEN.—I agree.

LORD ATKINSON.—I agree.

Appeal dismissed (a).

BARNES v. BROWN

1908. Oct. 14.

[78 L. J. (K. B.) 39]

Reported also :

[1909] 1 K. B. 38 ; 99 L. T. 801 ; 72 J. P. 485 ; 25
T. L. R. 3 ; 53 Sol. Jo. 14.

See also Minutes of General Medical Council :

Vol. XLV. (1908) 137 to 139.

Dentist—Unregistered person—Description implying that person is “specially qualified to practise dentistry”—“Painless extractions”—*Dentists Act*, 1878 (41 & 42 Viet. c. 33), s. 3—*Medical Act*, 1886 (49 & 50 Viet. c. 48), s. 26.

The words “specially qualified to practise dentistry” in section 3 of the *Dentists Act*, 1878, refer to special personal qualifications acquired by study and practice, and not to special qualifications or professional hall-marks such as those mentioned in other sections of the *Act*.

The appellant, who was not registered under the *Dentists Act*, 1878, and was not a legally qualified medical practitioner, was convicted for having unlawfully taken and used an addition or description implying that he was specially qualified to practise dentistry. The description—which was in these terms : “H. J. Barnes. Finest Artificial teeth at moderate prices. Extractions, advice free. Hours 10–7. English and American teeth. Advice free. Painless Extractions”—was on the door and windows of the appellant’s premises ; and his room was fitted as a dentist’s operating room. The appellant admitted that he carried on a dentist’s practice there, but he did not take or use the name or title “Dentist,” either alone or otherwise, or that of “Dental practitioner” : Held, that there was evidence to support the magistrate’s finding that the appellant had committed an offence against section 3 of the *Dentists Act*, 1878, by unlawfully using a description implying that he was “specially qualified to practise dentistry.”

CASE stated by a Metropolitan police magistrate.

On March 27, 1908, the appellant Henry John Barnes appeared before the magistrate to answer an information preferred against him by William Fletcher Thomas Brown, under the Dentists Act, 1878, and the Medical Act, 1886, complaining that the appellant on March 13, 1908, at 38 High Street, Marylebone, did, not being then registered under the Dentists Act, 1878, and not then being a legally qualified medical practitioner, unlawfully take and use an addition or description—namely, “H. J. Barnes. Finest artificial teeth at moderate prices. Extractions, advice free. Hours, 10–7. English and American teeth. Advice free. Painless Extractions”—implying that he was specially qualified to practise dentistry.

On the hearing of the information William Fletcher Thomas Brown, clerk to the solicitors to the British Dental Association, was called, and proved the following facts: On March 13 he went to the appellant's address. His rooms were over a dairy. His name was on the inner door and windows—“H. J. Barnes. Finest artificial teeth at moderate prices. Extractions, advice free. Hours 10–7. English and American teeth. Advice free. Painless extractions.” These notices could all be seen from the street. He went in. The room was fitted as a dentist's operating room with chair, engine, &c. He asked for Mr. Barnes, and the appellant appeared. He allowed the appellant to burr his tooth a little, and then told the appellant who he was, and that he (the appellant) was an unqualified dentist, and would be prosecuted. The appellant admitted he carried on a dentist's practice there. The appellant did not in fact take or use the name or title “Dentist” either alone or otherwise, nor that of “Dental practitioner.” No question arose as to the appellant's actual skill, and no evidence was given in regard thereto either one way or the other. It was admitted that the appellant was not registered under the statutes in that behalf, and that he was not a legally qualified medical practitioner.

Upon the foregoing facts it was contended on behalf of the respondent that the appellant was taking or using a style, title, addition or description implying that he was specially qualified to practise dentistry, contrary to the provisions of section 3 of the Dentists Act, 1878, as amended by section 26 of the Medical Act, 1886. It was further contended on behalf of the respondent that the words “specially qualified to practise dentistry” meant using such words as would imply to any person reading them that any such person seeking advice from the appellant or desiring the appellant to treat his teeth would get the benefit of such skill and treatment as would be given by a qualified or registered

dentist, and that the words used meant that the appellant was holding himself out as having special skill in dentistry.

On behalf of the appellant it was contended that no offence had been committed and also that the appellant did not use any name, title, addition or description implying that he was registered under the Dentists Act, or that he was a person specially qualified to practise dentistry within section 3 of the Dentists Act, 1878, as amended by section 26 of the Medical Act, 1886.

The magistrate came to the conclusion that the appellant by his notice, and especially by using the words "painless extractions," had held himself out as a person with very exceptional skill, and as a specially qualified person, within the meaning of the Dentists Act, 1878, and therefore had committed the offence charged. The magistrate accordingly convicted the appellant.

The question of law was whether the magistrate was right in his decision.

Danckwerts, K.C. (F. E. Smith, K.C., and Curtis Bennett with him) for the appellant.—In section 3 of the Dentists Act 1878, the words "a person specially qualified to practise dentistry" mean a person whose ability to perform dental operations has been recognised in some formal way by a public body—for example by a diploma; the words are not to be read in the popular sense as meaning qualified by personal skill and knowledge. That this is the correct view is clear from the words of the preamble. There the special qualification is obviously some professional hall-mark. Sections 4 and 10 of the same statute, and section 26 of the Medical Act, 1886, also support this view, as also does the Scottish case of *Emslie v. Paterson* [*ante*, page 217]; see especially the judgment of Lord Moncrieff who said that "the description contemplated by the statute is a description personal to the individual *ejusdem generis* with the preceding words, and indicating his special qualifications for the work by training and practice." Throughout the Medical Acts the words "qualification" and "qualified" are used in the sense of being in possession of some proved skill, recognised by a diploma or certificate; and the same construction ought to prevail under the Dentists Act. Under the Veterinary Surgeons Act, 1881, it is different, as was decided in *Royal College of Veterinary Surgeons v. Collinson* [*post*, page 334]. Even assuming that the words "specially qualified to practise dentistry" are to be construed in a popular sense, the notice put up by the appellant does not amount to a description that he was specially qualified. The appellant did not say that he personally would perform the operation; the notice does not connect him with the painless

dentistry, except that he is the proprietor of the premises. (*Panhans v. Brown* [ante, page 239] was also referred to.)

R. W. Turner, for the respondent.—The words “specially qualified” in section 3 of the Dentists Act, 1878, are used in their ordinary sense as meaning a person capable of giving skilful advice and treatment. To limit them to the technical meaning of a qualification or hall-mark recognised by some public body, as suggested on behalf of the appellant, would defeat the object of the Act and give no protection to the public; it would also be to go back on the decision in *Panhans v. Brown*. The words “specially qualified” occur also in section 17 of the Veterinary Surgeons Act, 1881, and in *Royal College of Veterinary Surgeons v. Robinson* [post, page 333], the view now contended for—namely that the words are to be given their popular meaning—was adopted by the Court—see especially the judgment of Wills, J. The same view was taken in *Royal College of Veterinary Surgeons v. Collinson* where a person who described himself as a “canine specialist” was held to have committed an offence under section 17 as having described himself as being “specially qualified” to practise a branch of veterinary surgery. Section 3 of the Dentists Act, 1878, is wider than section 17 of the Veterinary Surgeons Act, 1881, inasmuch as in the former the words are “a person shall not be entitled to take or use . . . any name, title, addition, or description implying that he is . . . a person specially qualified,” &c., whereas in section 17 of the Veterinary Surgeons Act, instead of the word “implying” the Legislature has used the word “stating.”

If the true view of section 3 is that now submitted, there was evidence entitling the magistrate to come to the conclusion of fact that the appellant had committed the offence charged. The notice on his premises certainly implied that he was specially qualified to give skilful advice and treatment.

Danckwerts, K.C., in reply.—No effect is given to the word “specially” in section 3 of the Dentists Act, 1878, if the construction contended for by the respondent is adopted. As to the words used by the appellant, there is nothing in them descriptive of himself; they are a mere statement of fact. To come within section 3 there must be something of a personal description of the particular individual. In *Royal College of Veterinary Surgeons v. Collinson* the words “canine specialist” amounted to a personal description.

LORD ALVERSTONE, C.J.—In my opinion we cannot allow this appeal. The case raises a question partly of law and partly of fact. The appellant was summoned under section 3 of the Dentists Act, 1878, for using a name, title, addition, or descrip-

tion implying that he was a person specially qualified to practise dentistry. The important point to be considered is whether the appellant is right in his main contention that the expression "specially qualified" imports the possession of some diploma or other hall-mark, and does not mean a statement of the person's qualifications as an individual—qualifications acquired by study and practice. There is a further point to be considered—namely, whether or not what was put forward by the appellant was a description of himself as a person "specially qualified to practise dentistry."

As to the first and main point, it seems to me that, looking at section 3 of the Dentists Act, 1878, and being assisted to some extent in its construction by the other statutes relating to kindred matters, the words "specially qualified" were not intended to refer only to qualifications such as those mentioned in the other sections of the Act; they must be read with reference to the words following them—namely, "to practise dentistry" as well as with reference to those preceding. The section, moreover, is somewhat wider than some of the others by using the word "implying." The construction that the words "specially qualified" are to be read as meaning special qualifications of the particular person is to a certain extent fortified by section 4 of the Act. We were, however, pressed with section 26 of the Medical Act, 1886. That section, which provides that the words "title, addition or description," where used in the Dentists Act, 1878, include any title, addition to a name, designation or description, whether expressed in words or by letters, or partly in one way and partly in the other, does not, in my opinion, support the view put forward on behalf of the appellant; it does not narrow the description in section 3, and it was wanted to make it clear that it is an offence to use the mere initial words of a qualification as distinguished from the qualification itself. I therefore come to the conclusion upon the construction of the statute itself, fortified, as I have said, by a consideration of the other statutes of the same kind passed almost contemporaneously, that we ought to read the words, "specially qualified" as including special personal qualifications to practise dentistry, and not as confined to the possession of what may be called the hall-mark qualifications, such as those mentioned in the Act.

The case is by no means devoid of authority. In 1892, in *Royal College of Veterinary Surgeons v. Robinson* [post, page 333] on the language of section 17 of the Veterinary Surgeons Act, 1881, which is practically identical with section 3 of the Dentists Act, 1878, except that it does not contain the word "implying," the point was expressly raised. In that case it was suggested by

counsel then appearing against the conviction that the words should receive the limited meaning now suggested; but that view was negatived. It was impliedly negatived by Mr. Justice Hawkins and expressly by Mr. Justice Wills, who in this judgment said this: "I think that the word 'qualified' is used in the 'section in its popular and not in its technical signification.'" Therefore, so far as the opinion of the Court is concerned, there is, as far back as 1892, the express opinion of Mr. Justice Wills that a limited meaning is not to be put upon the words "specially qualified." The same view was assumed in *Panhans v. Brown* [ante, page 239] to the decision of which Mr. Justice Wills was also a party. In *Royal College of Veterinary Surgeons v. Collinson* [post, page 334] I expressed the same opinion. Upon the English authorities, therefore, by which I think we are bound, it has been recognised by a series of decisions that the words "specially qualified" are not to be construed in the narrow sense suggested on behalf of the appellant.

It was said, however, that the Scotch case of *Emslie v. Paterson* [ante, page 217] was an authority against that view. I do not agree. In that case the ultimate words upon which the decision was given were, "American dentisty. A. Emslie, Dental Office." These were the only words upon which the decision proceeded. When the judgments are carefully examined, it will be found that they really express no opinion in support of the argument advanced in this case on the part of the appellant. Lord Moncrieff said this: "I agree that the description contemplated by 'the statute is a description personal to the individual *ejusdem generis* with the preceding words, and indicating his special qualifications for the work by training and practice"—not by any qualification received under the statute or justified under the statute, but by "training and practice." Lord Trayner said: "What the statute provided against is any one using a name or designation which is descriptive of a registered or qualified practitioner, who is not in fact entitled to the designation which the assumed name or description implies. Here the appellant has assumed no title whatever. He does not call himself a dentist, dental practitioner, dental surgeon, or licentiate in dental surgery. If he did so he would contravene the statute. But he has added nothing to his own name (which, I think, is the thing the statute prohibits) by way of title, addition or description implying that he is registered as a dentist, or that he possesses or claims to have any special qualification for the performance of dental operations." I understand that to be in that judgment, as in the other, a recognition that such a description might constitute an offence within

the meaning of the statute. The Lord Justice-Clerk said : “ I cannot find in these words ” (which I have stated—“ American dentistry. A. Emslie, Dental Office ”) “ anything which implies ‘ special ’ qualification. If the appellant can without any breach of the criminal law extract teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry. The Act strikes at his asserting that he has ‘ special ’ qualification for doing so, and whatever that may mean, I am unable to hold that the use of the words ‘ American dentistry ’ in connection with his name, or calling his place of business a ‘ Dental Office ’ can be held to be taking or using a name or title, addition, or description implying that he has a ‘ special ’ qualification, as distinguished from an assertion that he is qualified.” In my opinion, all the Judges used the words “ specially qualified ” in the sense I have indicated, as describing a personal qualification of the particular individual to practise dentistry.

Upon the main point, therefore, we ought to hold, as was held in the previous cases, that the words “ specially qualified ” include a representation that the person has special personal qualifications ; and that what the section is aimed at is a description which by direct expression or implication improperly states that he has special qualifications to practise dentistry.

Upon the remaining point I confess that I have felt some doubt, but I am unable to come to the conclusion that the magistrate has arrived at a wrong decision in point of fact. Counsel for the appellant contended that, looked at fairly, these words cannot describe, and ought not to be held as describing, personal qualifications. The words, “ H. J. Barnes. Finest artificial teeth at moderate prices,” might mean that he sold the teeth for somebody else to put in ; but that would not be anything which would indicate that he had special qualifications. If the real case had been that the appellant was only selling things which he was entitled to sell—that he was not carrying on the business of a dentist—there might have been a good deal to be said for the view that the words are ambiguous and ought not to have a construction put upon them which is inconsistent with the business carried on by the appellant. Here it was proved that the respondent had gone into the appellant’s room, had sat down in the chair, and had his teeth burred by the appellant. It cannot, therefore, be said in favour of the appellant that he does not in fact carry on the business of a dentist. I come now to the remaining words. What is the inference to be drawn from them ?—“ Extractions, advice free Painless

“extractions.” The magistrate has thought that those words indicate that the appellant has special qualifications enabling him to extract teeth without pain. It is certainly open to that construction. For myself, I think I should have liked to know a little more about the business the appellant was carrying on, but I cannot say that the conclusion at which the magistrate has arrived is one to which he was not entitled to come—namely, that this was a statement that the appellant had special qualifications to extract teeth. In that view there was evidence of an offence within the statute, assuming that I am right in the view I have already expressed as to its meaning. I think, therefore, that this appeal must be dismissed.

BIGHAM, J.—I think the expression “specially qualified” covers the case of a person who by study and practice of his profession has acquired a knowledge and skill not possessed by ordinary people. The expression is not used in any narrow or technical sense but is used in the popular sense as meaning a person experienced in the work. I think that the words used by the appellant are intended to convey, and do convey, that he is so specially qualified. There is his name, which governs the whole announcement. Then there is the statement that he extracts teeth, that he gives advice free, and that he effects painless extractions. I confess I do not feel the difficulty which my Lord feels in reference to this matter. It seems to me impossible to say that the notice on the appellant’s door and windows is not a description within the statute implying that the appellant is a person specially qualified to practise dentistry.

WALTON, J.—I agree.

Appeal dismissed.

ATTORNEY-GENERAL *v.* GEO. C. SMITH, LIMITED

[78 L. J. (Ch) 781]

1909. *Jan.* 23.

Reported also :

[1909] 2 Ch. 524 ; 100 L.T. 225 ; 25 T.L.R. 257.

See also Minutes of General Medical Council :

Vol. XLIII. (1906) 60, 61, 62, 266, 267, 268, 269.

Dentist — Unregistered Person — Company professing to

practise as dentists—Injunction—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3.

The Court will restrain a company from representing that they are carrying on, or intend to carry on, the profession or business of dentists as successors to a person who was in fact an unregistered dentist, and from acting in contravention of section 3 of the Dentists Act, 1878.

Motion for judgment in default of defence, in an action brought at the relation of the honorary secretary to the British Dental Association, against George Charles Smith, Lim., and George Charles Smith.

The defendant company was incorporated on October 22, 1906, under the Companies Acts, to acquire and take over as a going concern, and carry on, the profession or business of dentists and makers of artificial teeth lately carried on by the defendant G. C. Smith at Lewisham and other places. G. C. Smith was the only director.

G. C. Smith had been registered as a dentist, he having been in practice before the passing of the Dentists Act, 1878, but was struck off the register on May 22, 1906, by reason of conduct infamous or disgraceful in a professional respect. He had since been twice convicted and fined for taking and using the title surgeon-dentist.

In addition to the above facts the statement of claim alleged that the company was unlawfully carrying on the practice or business of dentists, and employing for that purpose the said G. C. Smith and other persons not being registered dentists or legally qualified medical practitioners; that it was taking and using the title of surgeon-dentists and holding itself out as employing registered dentists or persons specially qualified to practise dentistry; and that, so far as it was formed to take over Smith's business, it was not formed for a lawful purpose, but to enable him to continue to carry on the practice of a dentist and evade the penalty imposed by section 3 of the Dentists Act, 1878.

The plaintiff claimed injunctions against both defendants.

Micklem, K.C., and R. W. Turner for the plaintiff.—By analogy to section 3 the Court can restrain the company from representing that they are employing registered and qualified persons as dentists. It may be that they could not themselves be registered under the Act. Lord Selborne in *Pharmaceutical Society v. London and Provincial Supply Association* (1880) (a)

came to the conclusion that a company could not be registered under the Pharmacy Act, 1868, which is *in pari materia* with the Dentists Act, 1878. In that case the House of Lords decided that under the special circumstances the defendant company was not liable for penalties, but that the question whether the word "person" in a statute included a corporation must in each case depend on the object of the Act and the enactments by which it was attained.

It has been held in Ireland that a company adopting a name of which "surgeon-dentist" forms part does not become liable to be prosecuted for using a name implying that it is registered under the Dentists Act (*O'Duffy v. Jaffe* [*ante*, page 228]), that the word "dentist" as part of the name of a company, none of whose signatories was registered under the Act, would be a false representation (*Rex v. Registrar of Joint Stock Companies for Ireland* [*ante* page 231]); and that a company may be restrained from using the word in such a way as to mislead the public into believing that it employs qualified dentists (*Att.-Gen. v. Myddleton's, Limited* [*ante*, page 257]).

(SWINFEN EADY, J.—You can restrain the company because it is exceeding its powers, but I do not see what right you have to restrain Smith.)

An injunction against the company would probably be sufficient.

The defendants did not appear.

SWINFEN EADY, J., made the following order:—"The Court doth order that the defendants George C. Smith, Limited, be perpetually restrained from representing that they are carrying on or intend to carry on the profession or business of a dentist or surgeon-dentist as successors to George Charles Smith, surgeon-dentist, or that they are dentists or dental practitioners, and from taking or using any name, title, addition, or description implying that they are registered under the Dentists Act, 1878, or are persons specially qualified to practise dentistry."

BYRNE v. ROGERS

1910. Jan. 18.

[From the British Dental Journal, Vol. XXXI., page 174]

Reported also :

[1910] 2 I. R. 220.

Dentist—Person not on register—“Specially qualified”—Dentists Act, 1878, s. 3.

Appellant, an unregistered man, had advertised himself as “The World’s Expert Adaptor of Teeth,” “he tenders you original advice on the treatment acquired by his vast experience of 25 years abroad,” and other phrases vaunting his personal skill.

Held, quashing the conviction by the magistrate, that the words “specially qualified” in section 3 of the Act are confined to qualification by hall-mark, licence or diploma and do not include mere personal accomplishment as distinct therefrom.

Bellerby v. Heyworth (Court of Appeal) [post, p. 313] approved. Barnes v. Brown, [ante, p. 295] not followed.

CASE stated at the instance of the defendant pursuant to 20 & 21 Viet. c. 43 for the opinion of the King’s Bench Division (Ireland).

On 18th May 1909 the complainant charged the defendant before the Divisional Magistrate in Dublin for that he did on 2nd April 1909, not being then registered under the Dentists Act, 1878, and not being then a legally qualified medical practitioner, unlawfully take and use certain titles additions or descriptions implying that he was a person specially qualified to practise dentistry contrary to the statute, &c.

The defendant had advertised as follows in the *Evening Mail* of 2nd April 1909 :—“Consult Mr. Byrne, ‘the World’s Expert Adaptor of Teeth’; he tenders you original advice on the treatment acquired by his vast experience of twenty-five years abroad; decayed teeth infallibly treated by Nature’s own remedy; shattered health restored; all patrons delighted. Consultations free. Hours 9 till 7. Metropolitan address, 36, Talbot Street.—N.B. Letter appointments specially attended to.” Also: “Are you wanting artificial teeth, or a misfitting case re-made? Then come to me. I guarantee my work for

“life. Instalments taken. Fillings with gold or any of the
 “fifteen amalgams all one fee, 2s. 6d. Extractions (by my great
 “secret method) without gas, cocaine, or other drugs, one fee
 “only, 1s. Mr. Byrne, 36, Talbot Street.”

The following evidence was also given by one William Giltrap:—
 “I remember April 26 last. I went to defendant’s premises
 “36, Talbot Street. Outside his premises is a glass case bearing
 “printed words and on the street door are other printed words.
 “They read, ‘Mr. Byrne, the World’s Expert Adaptor of Teeth.
 “Extractions, 1s., by my own special system. Painless and
 “bloodless. Attendance 9 till 7.’

“I went upstairs where there was a lady waiting. I was
 “shown into Mr. Byrne’s consulting room, which contained the
 “usual appliances of a dentist. I asked defendant if he was
 “Mr. Byrne, the dentist. He said he was, and asked what he
 “could do for me. I got him to examine my mouth and came
 “away. I see the man in Court who stated he was Mr. Byrne,
 “the dentist.

“By Mr. Coffey: I asked him ‘Are you Mr. Byrne, the
 “dentist.’ He said, ‘Yes, can I do anything for you?’ and he
 “examined my mouth and made an appointment with me and
 “told me his fees.”

The magistrate believed the evidence produced on behalf of the complainant and was of opinion and found that the defendant took and used the two titles, additions, or prescriptions set forth in the summons, and that he purported to practise and operate, and did practise, as a person specially qualified to practise, dentistry.

Counsel for the defendant contended that such evidence did not warrant a conviction.

The judgment of the Court was required as to whether the magistrate was correct in point of law in his determination as aforesaid or as to what should be done in the premises.

Brown, K.C., and *Coffey* for the defendant.

Samuels, K.C., and *De Renzy* for the complainant.

LORD O’BRIEN, L.C.J.—This case has caused me much difficulty, both throughout the arguments and since. The case is difficult in itself, and it is rendered more difficult to me on account of the case of *Barnes v. Brown* [*ante*, p. 295]—a decision of a very eminent Court in England, presided over by the Lord Chief Justice, and consisting of three judges of great eminence. The question that we have to determine is what is the meaning of three words—really two words—and these words are “specially qualified.” These words occur in the 3rd section of the Dentists

Act of 1878, and upon their true construction the decision in this case depends. First, however, take the preamble of the Act. "persons specially qualified to practise as dentists in the United Kingdom." I emphasise the words "specially qualified." What do the words "specially qualified" mean? Do they mean specially qualified by statutory warrant, by licence, diploma, degree, or hall-mark, so to speak? Do they refer to these things alone? Or do the words include persons specially competent to practise dentistry, independent of diploma, degree, or hall-mark? I think that in common parlance, if you were asked, you would say that if a person is specially qualified, it would imply that he had a qualification by diploma, or licence, or degree—*prima facie*, I do not think there would be any doubt that such a one would be a qualified person. That is the meaning that Lord Justice Buckley attached to these words in *Bellerby v. Heyworth* [*post*, at page 320]. Now turn to the 6th section of the Dentists Act. It cannot be contended with any show of reason that the defendant here comes within that section, if a person "specially qualified" means, as Lord Justice Buckley says, a person to have the qualifications referred to in that 6th section. Then the question is this: Have the words "specially qualified" in the 3rd section a wider operation than those referred to in the preamble and those referred to in the 6th section? It comes to that. The other "distinguished judges in deciding *Barnes v. Brown* were of opinion that the words in the 3rd section went further than the words in the preamble and in the 6th section—that they mean persons qualified by personal accomplishment, personal skill, as distinct from qualified outside the person—by diploma or hall-mark. That is the basis of the decision in *Barnes v. Brown*. Now, in the advertisement that the defendant here published it is not contended that he claimed to have any qualification dependent upon diploma, degree, or hall-mark. But it is argued that he did claim that he was specially qualified by experience, by his study and practice of the trade, and it is therefore contended that he is amenable to the section. After the most careful consideration—each of us gave this case the most careful consideration—not alone having regard to the public importance of it, but having regard to the decision in *Barnes v. Brown* of eminent Judges, we are satisfied that that judgment was wrong, and cannot be supported. We have come to the conclusion that the words "specially qualified" in the 3rd section of the Act of 1878, mean qualified by diploma, licence, or hall-mark, and do not include persons qualified by mere personal skill, mere study, or practice, or training; that "qualification" is a thing external—a degree or diploma, external to the practitioner, and does not

include mere personal skill, mere personal accomplishment. What influences me in coming to that decision is a section that I do not find adverted to in the cases in England. It was not adverted to in the arguments in *Barnes v. Brown*, although the case was extensively argued. I have, with my Brothers, considered the section I am going to refer to. We have considered it separately and in consultation. The section I refer to is section 4. The qualification there mentioned is something external to mere personal accomplishment—it is a hall-mark or diploma or degree. This section shows that a condition necessary to the prosecution is that he shall use the designation of a qualification or certificate which is conversant with something external to himself—a hall-mark or diploma or licence, and if you attach to the words “specially qualified” in the 3rd section a meaning different from that which I have indicated before, you immediately produce an antagonism between the 3rd section and the 4th section. It is not really that the 4th section extends the 3rd section, and I think if you read in the 3rd section the words “specially qualified” as a mere accomplishment as distinct from a hall-mark, you produce an antagonism inconsistent between the two sections. Now, to go on. It would appear to me that “qualification” is used throughout this Act of Parliament as a qualification external to the practitioner, and different from mere personal competency, mere personal skill or accomplishment; that it is confined to qualification by hall-mark or diploma or degree—something external—and I would say this is the more apparent in the 7th and 11th sections. The 7th section shows that “qualification” is altogether a different thing from mere personal skill or competency—that “qualification” means something distinct from competency; something such as diploma, or degree, or hall-mark. So likewise in the 11th section. Looking at the entire Act, and especially at that 4th section, and having regard to the arguments founded upon it—my brother Judges and I, both in consultation and separately, have considered the effect of this 4th section (which does not seem to have been referred to in the arguments in *Barnes v. Brown*)—looking at the Act, I think the words in the 3rd section, “specially qualified,” are confined to qualification by hall-mark, licence, or diploma, and do not include mere personal accomplishment as distinct from hall-mark or diploma. If this were a mere civil case, I think I would be justified in saying we would follow the judgment of *Barnes v. Brown*. But it is not a civil case. It is concerned with a penalty, with a fine; and before we impose a fine or penalty I think we should be satisfied that we have statutory warrant to do so. Now, in this case I am of opinion that there is no statutory

warrant at all ; and I am of opinion that the judgment in *Barnes v. Brown* cannot be supported. But there has been a ease upon authority, apart from the decision in *Barnes v. Brown*. I think the judgment of the Master of the Rolls in the ease of *Bellerby v. Heyworth* goes to the length really of over-ruling *Barnes v. Brown*. In that ease the very learned the Master of the Rolls said that the Dentists Act was passed for the protection of dentists ; and towards the end of his judgment he says :—"I have thus far refrained from criticising or commenting upon the judgment in *Barnes v. Brown*. It is needless to say that I have considered what was said by the Lord Chief Justice and Bigham, J., in that case with the utmost respect, but I must confess that I am unable to follow the reasoning in that case—reasoning which seems to me to go the length of saying that people must not announce that they do that which by law they are entitled to do, and that by saying that they do, and do well, that which the law entitled them to do they are necessarily infringing the Act. I can find no such personal description, either expressed or implied, in what has been done here as brings the ease within the section. Therefore, with great deference to the Divisional Court, I prefer the view taken by the Scottish Court, and I think that decision ought to be followed in preference to *Barnes v. Brown*. It follows that this appeal must be allowed and the action dismissed."

I think that substantially shows that, in the opinion of the Master of the Rolls in England, *Barnes v. Brown* was wrongly decided. Upon the whole ease, having regard to the language of the Act of Parliament itself, having regard especially to the 4th section—to which I attach very great importance, and so do my brother Judges—and to the decision of the Master of the Rolls in *Bellerby v. Heyworth*, I think we should declare that this defendant is not amenable to the charge preferred against him, and that he should be acquitted of it.

MR. JUSTICE WRIGHT—The question to be decided in these two summonses is concerned with the construction to be put on the words "specially qualified" in section 3 of the Dentists Act, 1878, as amended by section 26 of the Medical Act, which had been decided in the ease of *Barnes v. Brown*. In accordance with that decision the magistrate convicted the defendant, but at the defendant's request he stated a case for the opinion of this Court. If this decision of the English Court of King's Bench stood alone it might appear necessary to follow it here, for the sake of uniformity among the Courts of the three Kingdoms ; but there was not unanimity of opinion among the members of the Court as to the meaning of the words "specially qualified."

And the decision had been criticised by the Court of Appeal in the case of *Bellerby v. Heyworth*, some of the Judges in the latter case, however, refraining from expressing an opinion as to the interpretation to be given to these words. In this state of affairs, I consider I am bound to form and express my own opinion as to the construction to be put on the words "specially qualified," more especially as it raises a question of great importance. In deciding this question it is well to consider sections 3, 4, 6, 7 and 11 of the Dentists Act of 1878 and the Preamble.

It seems to me impossible to hold that "qualification" means personal skill or fitness which is acquired by long practice. The word occurs not merely in the preamble, but also in the five sections I have mentioned; and it appears to me that it is impossible to say it means one thing in one section and in another section another thing. When you speak of a "qualified" man you mean a man who has qualifications derived from outside sources—outside himself. I think when the word "qualified" is used, it means something conferred that the individual holds or has got—not something personal that he has acquired by experience. Any man may draw teeth if he likes, and may say that he does so, and that he does his work well, as the Master of the Rolls said in the case of *Bellerby v. Heyworth*. The Act of 1878 did not take away that right. It exists now as it always did. The Act gives a certain status to the registered dentist and empowers him to recover his fees. Having regard to the law before the Act of 1878 and since, and having regard to every section of the Act I have examined, I am of opinion that "qualification" means diploma or degree conferred by a recognised public body capable of conferring something outside the personal qualities of the individual.

Now, turning to the advertisements which the defendant inserted in the newspapers: Taking those two advertisements, I read them as the ordinary man would read them, that he wants people to consult him at a very low fee compared with the more costly dentist; and that they would never convey to my mind that the defendant implied that he ever took any University or College degree or diploma in dentistry. I pass by as not worthy of notice the fact that he was asked by an interested party, "Are you Mr. Byrne the dentist?" and that he replied "Yes." For the reasons I have stated, I am of opinion that the decision of the magistrate was wrong, and that the summonses ought to be dismissed. I regret that our decision should be contrary to the opinion of the Court of King's Bench in England, as it is highly desirable in construing a statute of this kind that there should be uniformity; but as my Lord has said, this is a statute

creating a criminal offence, rendering a person liable to prosecution and penalty ; and even were we not bound by the opinion of a Superior Court, in a case of this kind where there is no decision tying our hands, I am bound to form my own opinion judicially, and I shall not vote for convicting a man where no offence has been committed.

MR. JUSTICE DODD—The statute in this case is a difficult one to construe. It prohibits words ; it does not prohibit acts. A man may practise dentistry, but he may not call himself a dentist, or take or use a title or description implying that he is a person specially qualified to practise dentistry unless he is registered under the Act. The question to be determined in this case is—did the defendant take and use a description implying that he was “ specially qualified ” ? Did the words complained of in the advertisements convey the idea to the public mind that he was a dentist with a diploma—one registered under the Act ? “ Consult Mr. Byrne, the World’s Expert Adaptor of Teeth. He “ renders you original advice on the treatment required through “ his vast experience of twenty-five years abroad. Decayed teeth “ infallibly treated by Nature’s own remedy ; shattered health “ restored ; all patrons delighted ; consultations free.” Now, the only part of that advertisement that can be said to be a description is “ the world’s expert adaptor of teeth.” Is that a statement that he is “ specially qualified ” ? If you were to put that question to the “ man in the street ” he would reply—“ That depends on “ what you mean by the word ‘ qualified.’ If it means ‘ competent ’ “ —Yes.” If they implied that the advertiser is specially competent from a qualification derived from some external authority, then the words would not apply to this case. Between the time that this case was argued and now I heard actions at Nisi Prius, cases in which medical witnesses were examined, and I noticed that as soon as the witness was sworn, the first question put was, “ Are you a fully qualified medical man ? ” The answer was “ Yes ” ; and the next question was, “ Please state your qualifications.” The witness would give what his qualifications, his degrees, were ; and counsel would say “ All these are very special “ qualifications.” The Lord Chief Justice called your attention to section 4 of the Act, and that the word “ qualification ” was there used in the same sense as counsel used it ; and it is clear from what the Lord Chief Justice has said about that section that if a person takes or uses “ a designation of any qualification ” or certificate “ qualification ” there must mean something external to the person himself. I approach this merely for the purpose of seeing what the word “ qualification ” means in the Act, and if we follow out the same line section by section, and

even in the marginal note, we will find that "qualification" and "specially qualified" mean something appertaining to a diploma, a degree, or hall-mark; and that nowhere throughout the Act is it used in the sense of the word "competent." We have to determine whether the words "specially qualified" have a wider meaning than the word "qualification" throughout the sections. In section 4 we have "takes or uses the designation of any "qualification or certificate in relation to dentistry or dental "surgery"; and in section 5 we find the word "qualified" again. Everywhere in the Act the words "qualified" and "qualification" are used in the self-same way. That being so, it is not necessary to go further than to say that "qualification" is something conferred by Statute. Can it have a different meaning? I think it can not. I have endeavoured to approach this matter with an open mind; and having regard to the interpretation of the Statute—the Dentists Act of 1878—I am of opinion that it does not hit the competent person, a person competent from his own experience to extract and adapt teeth, so long as he does not call himself a "dentist" or describe himself as "specially qualified." In this case the defendant does not say that he is a "dentist" or that he is "specially qualified."

It remains for me to consider very shortly whether there is anything in any of the cases already decided to modify this view or anything in the comity of the Court to prevent this view being adopted in this Court. That depends upon whether the decision in *Barnes v. Brown* is binding upon this Court, or whether the judgment of the Court of Appeal in *Bellerby v. Heyworth* has deprived the former decision of its force. The Court of Appeal in *Bellerby v. Heyworth* refrained from expressing their views on the interpretation of the words "specially qualified." The Court of Appeal held that the judgment in the case of *Barnes v. Brown* was erroneous. The Master of the Rolls said they could not follow the reasoning of it. In this case I am of opinion that the words used by the defendant in his advertisements are words grounded upon his own experience; that he is entitled to say he does his work well; that he has twenty-five years' experience; and that his skill is founded upon such experience. In effect the defendant asked for the patronage of the public in this way, "I am not one of those professional dentists; I rely not upon "diplomas of any licensing bodies, but on my own skill acquired "from my long experience." He does not use the word "expert" in the sense of specialist. The advertisement, of course, is utterly unprofessional; and it is with very great reluctance I am forced to come to the conclusion that what the defendant in this case has done is not prohibited by the Act.

THE LORD CHIEF JUSTICE.—No costs.

Mr. Brown, K.C. (for the defendant).—I think the usual practice is to give costs.

THE LORD CHIEF JUSTICE.—We give no costs.

BELLERBY v. HEYWORTH

[78 L. J. (Ch) 666 ; 79 L. J. (Ch) 402]

Reported also :

[1909] 2 Ch. 23 ; [1910] A. C. 377 ; 101 L. T. 254 ; 102 L. T. 545 ; 53 Sol. Jo. 576 ; 54 Sol. Jo. 441 ; 25 T. L. R. 591 ; 26 T. L. R. 403 ; 73 J. P. 361 ; 74 J. P. 257.

IN THE COURT OF APPEAL

1909. May 21.

Dentist—Partners—Unregistered and unqualified persons—Description—“Specially qualified to practise dentistry”—Notice containing statement of work done—“Painless Extraction. Advice Free”—Dentists Act, 1878 (41 & 42 Vict. c. 33), ss. 3, 6—Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26.

There is nothing in the Dentists Act, 1878, which prevents any man from doing dentists' work and informing the public that he does such work. The description which is forbidden by section 3 is a personal description of the man as distinguished from a description of the work which he does.

Quære, whether the persons “specially qualified” as mentioned in section 3 must necessarily be persons falling within section 6, which details the particuar qualifications required by those who are entitled to be registered under the Act.

Three persons, who were neither registered under the Dentists Act, 1878, nor legally qualified medical practitioners, became partners in the business of the extraction and adaptation of teeth. Two of the partners affixed upon the partnership premises a notice in these terms : “Bellerby, Heyworth and Bowen. Finest Artificial Teeth. Painless Extraction. Advice Free. Mr. Heyworth attends here.” The other partner objected to the notice on the ground that it was a contravention of section 3 of the Act. He accordingly under the provisions of the articles of partnership gave notice to his co-partners determining the partnership, and claimed a declaration that such

partnership had been duly dissolved :—Held, that he was not entitled to the declaration inasmuch as there was no such personal description, either express or implied, in the notice objected to as brought the case within section 3 of the Act.

Emslie v. Paterson [ante, page 217] approved and followed.

Barnes v. Brown [ante, page 295] overruled.

Appeal from decision of PARKER, J.

The action was brought by the plaintiff James Bellerby for a declaration that a partnership entered into by him with the defendants Joseph Heyworth and William Forest Bowen had been duly dissolved by notice given by him.

By the articles of partnership, which were under seal and dated February 1, 1909, the plaintiff and the defendants became partners in the business of “the extraction and adaptation of teeth” for the term of one year from the date of the articles. Clause 10 of the articles was as follows :—“If at any time during “the continuance of this business any of the” partners “shall “take or use in any way whatever any name title addition or “description or otherwise do anything which shall be an offence “and in contravention of the Dentists Act 1878 or the Medical “Act 1886 or any statute regulating the profession or practice of “dentists in the United Kingdom then and in such case the other “or others of the said partners may by notice in writing given “to the partner or partners so acting in contravention as aforesaid “determine the partnership as regards such last mentioned partner “or partners whereupon the said partnership shall cease and “determine accordingly.”

The defendants on February 9, 1909, fixed upon the partnership premises the following notice :—“Bellerby, Heyworth and “Bowen. Finest Artificial Teeth. Painless Extraction. Advice “Free. Mr. Heyworth attends here.” The plaintiff objected to this notice on the ground that it was a contravention of section 3 of the Dentists Act, 1878, inasmuch as none of the partners were registered as dentists pursuant to that Act nor were any of them legally qualified medical practitioners. The defendants insisted upon retaining the notice, and the plaintiff on February 12, 1909, gave the defendants notice in writing under clause 10 of the articles of partnership determining the partnership. The defendants alleged that the notice displayed by them was legal and proper, and denied that the plaintiff was entitled to dissolve the partnership. The plaintiff then brought this action.

PARKER, J., held, following the decision of the Divisional Court in *Barnes v. Brown*, that the notice published by the defendants was an offence under section 3 of the Dentists Act,

1878, and he accordingly made the declaration asked for by the plaintiff.

The defendants appealed.

Alexander Grant, K.C., and Grimwood Mears, for the appellants. The question of law raised by this appeal is as to the meaning of the words "specially qualified to practise dentistry" in section 3 of the Dentists Act, 1878, as amended by the Medical Act, 1886, s. 26. The words "qualified" and "qualification" in the Act of 1878 and in the Medical and Veterinary Surgeons Acts, mean, the possession of the statutory title to registration given by the particular Act relating to the particular profession, and have no other meaning. The Divisional Court in *Barnes v. Brown*, which is practically now under appeal, held that the expression "specially qualified" ought to be read not in that technical sense, but in the popular sense of possessing special personal qualifications acquired by study and practice. The terms "qualified" and "qualification" are employed in the limited and technical sense throughout the Medical Act, 1858 (21 & 22 Vict. c. 90) which is the original of all the later registration Acts. That Act begins with the recital that "it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners"; and sections 7, 15, 20, 21, 30, 31, 34 and 40 show clearly that the expressions "qualified" and "qualification" are used only in connection with a person possessing the statutory title to be placed on the Medical Register. And the Act only recognises as medical practitioners the persons mentioned in Schedule (A)—that is to say, qualified men who have obtained a certain degree giving them the statutory title to registration. The Act, however, does not prohibit an unqualified person from practising, but he is not entitled to recover any charge in a court of law unless he is registered under the Act—see section 32.

(BUCKLEY, L.J., referred to *Davies v. Makuna* [*ante*, page 103].)

It would appear from that case that under the Apothecaries Act (55 Geo. 3, c. 194) a man may not practise medicine without being properly qualified, but he can practise surgery—he may be a bone-setter. But whatever may be the position with regard to the medical profession, any person may extract teeth—as was frequently done by the village blacksmith—and may practise as a manipulator of teeth; but he is forbidden by the Act of 1878 to call himself a dentist unless he is registered thereunder. According to the preamble of that Act, which, although repealed by the Statute Law Revision Act, 1894 (57 & 58 Viet. c. 56) may still be referred to, the object was to make provision "for the registration of persons specially qualified to practise as dentists

“in the United Kingdom, and that the law relating to persons practising as dentists be otherwise amended.” In section 3 the words “specially qualified” must be read in connection with the same words in the preamble, and those words in the preamble must be construed by reference to section 6, which shows that the words are used not in the popular sense, but in the narrow and technical sense of possessing the title to registration introduced by the Act. The intention of the Legislature was not to prevent a man from stating that he had experience and skill, provided he did not describe himself as a dentist or dental practitioner or use any description implying that he was registered under the Act or had the statutory qualifications to practise dentistry. The word “qualification” in the Act signifies the holding of such certificates, diplomas, degrees, or licences therein mentioned as may be recognised by the General Council as entitling the holder to practise dentistry or dental surgery—see sections 4, 5, 7, 10, 18, 27. The expression “specially qualified” is used in section 3, because under section 6 the qualification necessary for registration is that the person should either be the holder of a licence, degree, or other recognised title, or else that he should at the passing of the Act have been *bona fide* engaged in the practice of dentistry or dental surgery. Consequently the words “specially qualified” do not necessarily connote the possession of special knowledge and skill in dentistry. Section 3 is a penal section, and ought to be construed strictly and in accordance with the interpretation placed upon the corresponding section in the Medical Act, 1858. The Act of 1878, by section 6, created a special class of dentists, and the protection provided by section 3 exactly covers section 6, but extends no further. Again, the description contemplated by section 3 is not a description of a man’s work but a description personal to the individual *ejusdem generis* with the preceding words, and indicating his special qualifications for the work by training and practice—*Emslie v. Paterson* a decision of the Scottish Court which strongly supports the appellants’ contention. In the present case, as also in *Barnes v. Brown* which is contrary to the decision in *Emslie v. Paterson* the description has reference solely to the work done; it is not a description personal to the individual, and there is no holding out of any qualification whatever, whether by diploma, certificate, or otherwise. The Divisional Court in *Barnes v. Brown* considered that they were bound by the decisions of the Divisional Court in *Royal College of Veterinary Surgeons v. Robinson* [post, page 333] and *Royal College of Veterinary Surgeons v. Collinson* [post, page 334]. Those were cases under the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), the penal clause there (section 17)

being practically the same as section 3 in the Act of 1878, but the preamble is not in similar terms. In the earlier case an unqualified person who had described his place of business as a "veterinary forge" was held to have brought himself within the Act, but the point as to whether the description was a statement that he was "specially qualified to practise" does not appear to have been argued. In the later case, where the words used were "Canine Specialist. Dogs and cats treated for all diseases," all the members of the Court agreed that they would not have decided *Royal College of Veterinary Surgeons v. Robinson* in the same way, and Ridley J., and Darling J., simply followed that case. There was, however, no argument on behalf of the respondent, and *Emslie v. Paterson* was not cited. Under the circumstances those cases are not conclusive as against the present appellants. *Panhans v. Brown* [ante, page 239], which was the case of a conviction under section 3 of the Dentists Act, 1878, is distinguishable. There the additional title used by the offender implied that he had been registered under the Act, and contained the word "registered"; and the point, that the words "specially qualified" in the section had the popular and not the technical signification, was not argued, but was clearly assumed.

W. F. Hamilton, K.C., and *Gatey* for the respondent, the plaintiff.—*Barnes v. Brown* was rightly decided and ought to be applied to the present case. The preamble of an Act of Parliament cannot control the enacting part when the latter is free from ambiguity, just as in the case of a deed the recitals cannot control the operative part which is clear in its terms. There is no ambiguity in section 3 of the Act of 1878, and consequently the words "specially qualified" in that section are not controlled by the preamble. They are not limited to the qualifications mentioned in section 6, but have a much wider meaning, and include a personal qualification in the ordinary sense of the possession of special knowledge or skill in dentistry. The contention on behalf of the appellants is that the words are confined to personal qualifications only, but the terms of the notice in this case, "Painless Extraction. Advice Free. Mr. Heyworth "attends here" amount to a representation to the public that the person there mentioned is specially qualified to execute the work which he advertises he will do. *Emslie v. Paterson*, whether rightly decided or not, is distinguishable. The words upon which the decision proceeded were, as was pointed out in *Barnes v. Brown*, quite different from those in the present case, and did not offend against the Act. *Panhans v. Brown* supports the plaintiff's contention. The cases decided upon the Veterinary Surgeons

Act, 1881, cannot admittedly be relied on in view of the difference in the language of that Act.

No reply was called for.

COZENS-HARDY, M.R.—This is in form an appeal from the decision of Mr. Justice PARKER, but it is in reality an appeal from a decision of the Divisional Court in a case heard last October—*Barnes v. Brown* [*ante*, page 295], and undoubtedly it raises a point of importance as to the true meaning and effect of the Dentists Act, 1878. I start with this, which I think is not really disputed, that there is nothing in the Dentists Act which prevents a man from doing dentists' work. It is not wrong under that Act for any man to do dentists' work, and it is not wrong for him to inform the public that he does that which it is lawful for him to do. But the Act, for the protection of dentists, enacted in short this: That there should be a register for dentists which should include British dentists, colonial dentists, and foreign dentists, all of whom might get on the register if they satisfied the requirements of the Act. As regards British dentists practising prior to 1878, no test of their knowledge was required; the mere fact that they had extracted a tooth before 1878 entitled them to be on the register. As regards those commencing to practise after 1878, the Act required them to comply with certain special qualifications, and as regards colonial or foreign dentists they had to satisfy the General Council of Medical Education that they possessed certain degrees or diplomas which, in the view of the Council, were an adequate guarantee of their skill. Having done that, Parliament, in section 3, said in effect this:—Although any man may act as a dentist, he shall not call himself a dentist, or use any words implying that he is a person specially qualified to do the work of a dentist, unless he is registered under the Act. As I read that section it is directed to the personal description of the man as distinguished from the description of the work which the man does.

I do not propose here, because I do not think it is necessary, to express an opinion as to the precise effect to be given to those words "specially qualified." In my view that matter does not arise for decision. What have the defendants done? The defendants were in partnership with the plaintiff, and the defendants put upon the partnership premises this notice and nothing more: "Bellerby, Heyworth and Bowen." Those are the names of the plaintiff and the two defendants. "Finest Artificial Teeth. Painless Extraction. Advice Free. Mr. Heyworth 'attends here.'" I ask myself, is there anything in that which is taking or using the name or title of "dentist" or "dental practitioner" or any name, title, addition, or description implying

that these gentlemen are registered under the Aet, or that they are persons specially qualified to practise dentistry although not in fact registered under the Aet? In my opinion there is not. I desire to adopt the language of the Lord Justice-Clerk in the case of *Emslie v. Paterson* [ante, page 217], where he said: "If the appellant can without any breach of the criminal law extract teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry. The Aet strikes at his asserting that he has 'special' qualification for doing so, and whatever that may mean, I am unable to hold that the use of the words 'American Dentistry' in connection with his name, or calling his place of business a 'Dental Office' can be held to be taking or using a name or title, addition, or description implying that he has a 'special' qualification, as distinguished from an assertion that he is qualified." I will also read a passage from the judgment of Lord Moncrieff, where he says:—"The signboard and plate mentioned in the complaint bear the inscriptions, 'American Dentistry, A. Emslie,' and 'Dental Office.' They do no more than notify that dentistry is carried on within; they contain no profession of the qualifications of the practitioner, and the plate does not even assert that the appellant is the operator." That seems to me to be the true meaning and effect of this section 3 of the Aet.

I have thus far refrained from criticising or commenting upon the judgment in *Barnes v. Brown*. It is needless to say that I have considered what was said by the Lord Chief Justice and Mr. Justice Bigham in that case with the utmost respect, but I must confess that I am unable to follow the reasoning in that case—reasoning which seems to me to go the length of saying that people must not announce that they do that which by law they are entitled to do, and that by saying that they do and do well, that which the law entitles them to do they are necessarily infringing the Aet. I can find no such personal description, either expressed or implied, in what has been done here as brings the case within the section. Therefore, with great deference to the Divisional Court, I prefer the view taken by the Scottish Court, and I think that decision ought to be followed in preference to *Barnes v. Brown*. It follows that this appeal must be allowed and the action dismissed.

BUCKLEY, L.J.—As regards the practice of medicine—that is to say, the dispensing of medicine, giving medical advice, and attending to the sick as medical adviser—the effect of the statute 55 Geo. 3, c. 194, and the Medical Aet, 1858, is that the unqualified person is prevented from practising as a medical

practitioner. As regards dentists that is not so. Anyone may practise as a dentist, anyone may extract a tooth or perform a dental operation. What the Dentists Act, 1878, does is to forbid a person who does practise dentistry from calling himself by certain names unless he satisfies certain qualifications mentioned in the Act of Parliament. The Dentists Act, 1878, commences with a recital that "it is expedient that provision be made for the registration of persons specially qualified to practise as dentists in the United Kingdom"; and section 6 details the particular qualifications required of those who are entitled to be registered under the Act of Parliament, so that, no doubt, in the language of the Act of 1878, the persons indicated in section 6 are persons who are in the preamble spoken of as persons "specially qualified to practise." But when in section 3 I find that a person practising dentistry is forbidden from using certain names and titles or any name and title implying that he is a "person specially qualified to practise dentistry," I am not, as at present advised, prepared to say that those words bear the same limited meaning. It is not necessary for the purposes of this case to decide whether persons specially qualified as mentioned in section 3 must necessarily be persons falling within section 6. As at present advised, I think they need not. It would be very difficult to say that, if a person put up a brass plate on his door, "Mr. A. B., a person specially qualified to practise dentistry, attends here daily to perform dental operations," he would not fall within the Act of Parliament. The argument presented to us on behalf of the appellants would involve that result. In the present case it is unnecessary to decide it, and I say nothing more about it.

But then the second point is that by section 3 a man is forbidden to call himself certain things: he must not call himself a dentist; he must not call himself a dental practitioner; he must not (reading the section with the alteration made in 1886) take or use any name, title, addition to a name, designation or description, whether expressed in words or by letters, or partly in one way or partly in the other, implying that he is registered under the Act, or that he is a person specially qualified to practise dentistry, unless he is registered. Now, in reading those words, it is to be observed that they are confined to forbidding descriptions of the person, as distinguished from descriptions of the acts to be done by the person. It may be that this section would cover the case of a man using an addition to his name which in terms has reference to acts, but is in reality a description of himself as a specially qualified person; it is difficult to draw the line and say where a description by reference to acts ends and a

description of the person begins. For instance, suppose a man used words representing that by reason of long experience he did the act exceptionally well, it may be that would be a description of himself as a person who was qualified in a particular way. But, subject to that difficulty in drawing the line, I feel no doubt in laying it down as a general proposition that what this section forbids is a description of the person as distinguished from a description of the acts done.

Applying that to this case, I cannot find here that there is any description of the person at all as being a dentist or a dental practitioner or a person qualified to practise dentistry. I find here a name, and then "Finest Artificial Teeth." That means, I suppose, that he either makes them or sells them. He may buy them, sell them, or fit them, but it is some operation or transaction in respect of artificial teeth. Then we have "Painless Extraction"—an act which he does or says he does; "Advice Free"—a statement that he gives advice and makes no charge for it. These are all simply statements of acts done, and not descriptions of the person as a person qualified to do the acts. I read from the argument in *Barnes v. Brown* this, which commands my assent. Mr. Danckwerts, who argued the case for the appellants, said, "If the construction contended for by the respondent prevails, 'a notification that 'teeth are extracted' will come within the 'section, because it implies that the person of whom it is stated 'is specially qualified to extract teeth. This would practically 'prevent a person who is entitled to practise dentistry from 'saying that he practised it.'" The argument of counsel for the respondent really went that length. He said "If a man says "'I do an act' that is to be taken to say 'and mark you I am a 'person particularly qualified to do the act.'" I do not think it follows at all. It seems to me that if, as the defendants have done in this case, they simply state acts which they are prepared to do, they are not, within section 3, implying that they are qualified to do the acts which they say they are prepared to do.

Three cases before the Divisional Court have been cited to us. I think it unnecessary to say whether those cases were rightly decided or not. They are all distinguishable from the present. The first is *Royal College of Veterinary Surgeons v. Robinson* [post, page 333]. There the words were "Veterinary Forge." If you can evolve out of those words the meaning that there was a forge attended by a person who was entitled to call himself a veterinary surgeon, the case may have been right. I do not say whether it was right or wrong. In the second case, *Royal College of Veterinary Surgeons v. Collinson* [post, page 334] the words were "Canine Specialist." That is directly a description of the person.

The defendant had taken upon himself to affirm that he was a specialist in what, having regard to the context, was plainly canine disease. If a man calls himself a specialist, he means it to be inferred that he is specially qualified in the matter in which he says he is a specialist. The third, *Panhans v. Brown* [*ante*, page 239] seems to me easy. A man called himself by the *alias* "German Dental Institute" and all that the Lord Chief Justice said was "He says he is a dentist; he has called himself a dentist 'under the phrase 'German Dental Institute.''" The case of *Emslie v. Paterson* is one which I think is very pertinent to the present, and with the reasoning of the learned Judges there I entirely concur. Whether it would be possible out of the words "American Dentistry"—"Dental Office," to evolve the idea that it was an office attended by persons who were calling themselves dentists, I will not say. If so, the decision might have been different; but the argument did not take that form. I think that the passage which the MASTER OF THE ROLLS has read in the Lord Justice-Clerk's judgment entirely covers the ground. "If 'the appellant can without any breach of the criminal law extract 'teeth and put in false teeth, or the like, I can see nothing in the 'statute forbidding him from announcing that he does so, which 'is just announcing he practises dentistry.'"

I think that under this Act of Parliament any man may say that he does dental acts, but he must not, unless he is a qualified person, say that he does them as a dentist. He must not describe himself as being a person of a particular kind, but he is entitled to say that he is there to "do a particular class of acts." For these reasons I think that this appeal succeeds.

KENNEDY, L.J.—I am of the same opinion. I refrain from saying whether I should assent to what I may call the highest view taken by the learned counsel for the appellants of the meaning of the Act of Parliament in their favour. That meaning is stated by the learned counsel in the argument in *Barnes v. Brown* in the sentence "Those words may well mean that the 'person must hold one of the qualifications specified in the Act 'so as to entitle him to be registered.'" Whether the words in section 3, "specially qualified," are to be confined in that way to the special qualifications which are named in the Act as entitling the person to be registered, I will not express an opinion. I cannot say that I am so unfavourably impressed at present by that suggestion as Lord Justice BUCKLEY has stated that he is; but it is unnecessary to decide that question here, because what does seem to be perfectly clear is, that, in order to bring section 3 into effect as against the practitioner in these cases, you must find that he has used a description implying that he is a person

specially qualified to practise dentistry. The mere statement that he practises dentistry certainly does not carry to my mind, and I do not think it would carry to any reasonable mind, that he was asserting that he was a person who was specially qualified. In a clause of this kind one must give, if one can, a meaning to all the words used, and it does not deal with a person who describes himself as qualified to practise dentistry, but with a person who describes himself as specially qualified. It may be, if a person says "I extract teeth," he does assert that he is a person who has the capacity or quality, if you please, of a person who can extract teeth, but he certainly does not assert that he has any special qualification for that purpose. It may be that in the words "specially qualified to practise" the Legislature does not mean to confine the prohibition to a person who uses that which is a definite and recognised personal attribute. In the case which has been referred to where "veterinary" was used as an adjective, not describing the man, but describing his place of business, it may be that the Court was justified in saying "You are really "suggesting to the public that you are a veterinary surgeon "in the sense of possessing a special and recognised qualification "as such." But you must find something of that kind where no attribute is used. In this case, as in *Barnes v. Brown*, which it is agreed does not differ in its effect in any material particular, there is no attribute of any kind of the man himself; but it is said you may, from the words "Painless Extraction," justly deduce an assertion of the possession by the man of a special qualification. It seems to me that, upon the fair reading of the whole of this advertisement, that is not a just or proper inference. He says, "There are in fact done here by me extractions which "are painless." As it seems to me, that, according to its fair and natural meaning, is simply a reference to a certain class of extractions—extractions under some anæsthetic process or with the application of drugs which dull the pain and produce total or comparative painlessness. I decline to draw from that the statement "I am specially qualified to practise dentistry."

As regards the cases which have been cited, other, of course, than *Barnes v. Brown*, I think one must deal with them as decisions upon the particular circumstances before the Court in each case. It is unnecessary to say whether one would have agreed or not with a past decision unless agreement or disagreement leads by a proper inference to what the decision should be in the case before one. It seems to me that all those cases may stand consistently with the decision to which we have come in the present case. I will only say with regard to one of them, *Panhans v. Brown*, to which I was a party, that, without pretending to

remember more than the facts which are recalled by perusing the judgment as reported in the *Justice of the Peace*, it seems to me, as has already been said by Lord Justice BUCKLEY, that that case in no way affects the present, and that the man there was saying "I am a specially qualified dentist," although he was saying so in a roundabout way. The words "German Dental Institute" constituted, as is, in effect, said in the judgment of the Lord Chief Justice, a mere *alias*. I agree that this appeal should be allowed.

Appeal allowed.

IN THE HOUSE OF LORDS

1910. April 15.

Dentist—Unregistered person—"Specially qualified to practise dentistry"—Dentists Act, 1878 (41 & 42 Vict. c. 33), ss. 3, 6.

The words "specially qualified to practise dentistry" in section 3 of the Dentists Act, 1878, import a professional qualification entitling the holder to registration under the Act, and not merely professional skill or competence. There is nothing in the Act which prevents any man from doing dentist's work and informing the public that he does such work without being registered under the Act.

Decision of the COURT OF APPEAL [ante, page 313] affirmed.

Barnes v. Brown [ante, page 295] overruled.

Appeal from a decision of the Court of Appeal (COZENS-HARDY, M.R., BUCKLEY, L.J., and KENNEDY, K.J.) which discharged an order of PARKER, J.

W. F. Hamilton, K.C., and Boome, for the appellants:—

The words "specially qualified" in section 3 of the Dentists Act, 1878, do not import the possession of a diploma or certificate which would entitle a man to be registered, but only the possession of competent skill for the practice of the profession. The words in the notice fixed up were "a name, title, addition, or description," within the section and apply equally to the respondents Heyworth and Bowen as to the appellant. They only imply skill in dentistry. This is virtually an appeal from *Barnes v. Brown*, where it was held that general competence and not technical qualification was intended by the Act. In *Royal College of Veterinary Surgeons v. Robinson* the strictly professional sense was adopted in similar language to the Veterinary Surgeons Act, 1881, as it was also in *Royal College of Veterinary Surgeons v. Collinson*. In the Irish case of *Byrne v. Rogers* [ante, page 305]

the Lord Chief Justice declined to follow *Barnes v. Brown* and after a full discussion of the authorities the Court followed the decision of the Court of Appeal in this case. The words in the Act are simply descriptive of the persons and of the work done by them.

Sir R. B. Finlay, K.C., Alexander Grant, K.C., and Grimwood Mears, for the respondents, were not heard.

THE LORD CHANCELLOR (LORD LOREBURN).—I think the conclusion of the Court of Appeal should be affirmed.

The question of law here is the meaning of the words “specially qualified to practise dentistry,” which are found in section 3 of the Dentists Act, 1878. I look at the preamble of that Act, not for the purpose of controlling the wording of the section, but to explain the purpose of the Act. It looks as if the purpose was to procure registration wherever persons are “specially qualified to practise.” Again, in sections 4, 5, 6 and 11 of this Act we find references to the qualification, and in those sections the allusion is to qualification by diploma or certificate or some formal hall-mark, to use popular words, and not to qualification by competence or skill.

Do the words in section 3 refer to qualifying or qualified in the same sense? The words are “A person shall not be entitled to take or use the name or title of ‘dentist’ (either alone or in combination with any other word or words), or of ‘dental practitioner’ or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.” The appellant argues that this means that he must not imply himself to be a competent or skilful person; in other words, the appellant argues that self-commendation is prohibited except to registered persons, and that this is the effect of the enactment. Such a purpose as the prohibition of self-praise seems to me not very germane to the scope of the Act, and not a very likely thing for Parliament to have resolved. The Act itself does not forbid any one from practising dentistry, but it only forbids the assumption of the “name, title, addition or description.” That looks something very different from self-praise or self-commendation.

On the whole, I think what is referred to is the possession of qualifications for registration, and that the object and effect is to make all who hold what I will in popular language call the hall-mark become registered. If they are not registered, then they must not say either that they are registered or that they have the qualifications which would entitle them to be registered. Of course, if they do not possess the qualifications which would

entitle them to be registered they are still more disabled from making the affirmation prohibited in this section.

I am aware that in expressing this opinion I am differing from the conclusion arrived at in the case of *Barnes v. Brown* [*ante*, page 295] but there are authorities conflicting with that decision, particularly in the Irish case *Byrne v. Rogers* [*ante*, page 305]. I might well content myself with merely expressing my concurrence with the judgment of the Lord Chief Justice of Ireland, which seems to me to be exhaustive and convincing.

I advise your Lordships to dismiss this appeal.

LORD JAMES of HEREFORD.—I concur.

LORD ATKINSON.—I agree, and I wish to express my concurrence in the judgment delivered by the Lord Chief Justice of Ireland, in which the several provisions of the statute are carefully examined. I think the conclusion is sound, and the reasoning by which it was arrived at commands my entire confidence and approval.

LORD SHAW of DUNFERMLINE.—I desire to give express concurrence along with your Lordships with the judgment of the Lord Chief Justice of Ireland in the case of *Byrne v. Rogers*.

In all these cases up to *Byrne v. Rogers* there did seem to me to be a full analysis of the term “specially qualified” in section 3, as that analysis is illustrated by the subsequent sections of the Act. In them there is particular reference to the word “qualification” and this word is put alongside of words such as “certificate,” “diploma,” and the like. That qualification appears to be, as the Lord Chief Justice of Ireland says, something in its nature external to the person, and not merely indicative of his own personal accomplishments or skill.

I assent to the course proposed, and as I say, I desire specially to record my assent to the analysis given by the Lord Chief Justice of Ireland.

LORD MERSEY.—I had some doubt as to whether I should take part in the hearing of this appeal, inasmuch as it involved the consideration of a judgment to which I was a party; but having heard the argument, and having been convinced that the judgment in which I took part was wrong, I see no reason why I should not say so. I think it was wrong, for the reasons given in the Irish case.

Appeal dismissed.

MINTER v. SNOW

1910. April 15.

[74 J. P. 258]

See also British Dental Journal :
Vol. XXXI., page 446.

IN THE HOUSE OF LORDS

This was an appeal by the plaintiff, Charles Minter, from an order of the Court of Appeal affirming a judgment of PARKER, J., dismissing the appellant's claim (*inter alia*) for an injunction to restrain the respondent, Henry Snow, from issuing a circular alleged to be a breach of covenant contained in an indenture of partnership made between the plaintiff and the defendant, dated June 22nd, 1909, and for a dissolution of the partnership.

The present case was brought at the instance of the British Dental Association because they were dissatisfied that the decision of the Court of Appeal in *Bellerby v. Heyworth* [*ante*, page 313] should not be reviewed by the House of Lords, and no appeal seemed probable, as the object for which that case was launched by the parties, namely, the obtaining of a decision which would overrule *Barnes v. Brown* [*ante*, page 295] was obtained. The notice complained of was differently worded and larger in its scope. The writ in the action was issued on June 25th, 1909, and formal judgment was taken by the plaintiff against himself both before PARKER, J., and the Court of Appeal.

The facts, so far as material, were these :

The plaintiff and defendant, neither of whom was registered under the Medical or Dentists Acts, or possessed any licence diploma or degree in medicine, surgery or dentistry, duly commenced their profession or business of dentistry, which included, amongst other things, the extraction of teeth, with or without a general or local anæsthetic, the fitting and supply of artificial dentures, and the stopping, regulating and treatment of teeth.

In June, 1909, the defendant issued a number of copies of the following circular in relation to the partnership business :

“ English and American Dentistry.

“ Painless Extractions.

“ Consultations and advice free.

“ Minter & Snow, Dental Institute,

“ No. 213, Richmond Road, Twickenham,

“ Hours 9 a.m. to 8 p.m.”

and caused the same to be distributed amongst the public.

The plaintiff requested the defendant to have the circulars called in and destroyed, and to undertake that in future he would not issue or distribute any such circulars, but the defendant refused to do so. By clause 11 of the indenture of partnership, it was agreed that neither partner should take or use any style, title or description, in connection with the practice in contravention of the Dentists Act, 1878, or any Act amending the same.

The plaintiff alleged that the issuing of the circular in question was a breach of this clause of the partnership deed.

D. Stewart Smith, K.C., and R. W. Turner for the plaintiff.—This case differs from *Bellerby v. Heyworth* in the form of the advertisement. It is submitted that the description here is an *alias* for “dental practitioner” one of the terms which is expressly forbidden by section 3 of the Act of 1878. As the term cannot be used by an unregistered person, neither can such a person use a paraphrase of it which conveys the same idea. What the defendant here purports to do is everything which a qualified dentist can do, for the notice, by introducing the words, “English and “American dentistry” covers the whole field of skilled dentistry. Reading the advertisement as a whole, it means that, “Minter & “Snow, Dental Institute,” is a place where painless extractions can be had, and where English and American dentistry is practised. That is the intent of the advertisement, because if it set out merely that Minter and Snow were only teeth extractors and teeth fitters, the advertisement would defeat its own object, for patients would not be invited by such a circular. The words, “specially qualified” in section 3 of the Act of 1878, are used in a popular and not a technical sense, and must be construed as in the corresponding clauses of the Veterinary Surgeons Act, 1881 (44 & 45 Viet. c. 62), s. 17 (1) [*post*, page 333], and the Midwives Act, 1902 (2 Edw. 7. c. 17), s. 1 (1) [*post*, page 335].

Mark Romer, K.C., and W. J. Fischer-Williams, for the defendant were not heard.

LORD LOREBURN, L.C.—My Lords, this case is clearly governed by the other, and I do not think that any distinction of any substance can be made between them, because the person charged here has not used words which the Act forbade him to use.

LORD JAMES of HEREFORD.—My Lords, I agree.

LORD ATKINSON.—My Lords, I concur.

LORD MERSEY.—My Lords, I also agree.

Appeal dismissed with costs.

NOTE ON THE APOTHECARIES ACT, 1815,
THE PHARMACY ACT, 1852, THE VETERI-
NARY SURGEONS ACT, 1881, AND THE
MIDWIVES ACT, 1902; AND ON CERTAIN
CASES DECIDED THEREUNDER.

THE APOTHECARIES ACT, 1815.

The five sections of this Act printed below, viz.—the 5th, 14th, 20th, 21st, and 29th, have come under consideration in the Decisions: see *Haffield v. Mackenzie* (page 10), *Attorney-General v. Royal College of Physicians* (page 28), *Turner v. Reynall* (page 70), *Leman v. Fletcher* (page 92), *Leman v. Houseley* (page 95), *Davies v. Makuna* (page 103), and *Howarth v. Brearley* (page 112). None of these sections have been repealed.

55 Geo. 3. c. 194. An Act for better regulating the
Practice of Apothecaries throughout England and
Wales. [passed 12th July, 1815]

* * * * *

5. AND WHEREAS it is the duty of every person using or exercising the art and mystery of an apothecary to prepare with exactness and to dispense such medicines as may be directed for the sick by any physician lawfully licensed to practise physic by the President and Commonalty of the Faculty of Physic in London or by either of the two Universities of Oxford and Cambridge. Therefore for the further protection security and benefit of His Majesty's subjects and for the better regulation of the practice of physic throughout England and Wales BE IT ENACTED, That if any person using or exercising the art and mystery of an apothecary shall at any time knowingly wilfully and contumaciously refuse to make mix compound prepare give apply or administer or any way to sell set on sale put forth or put to sale to any person or persons whatever any medicine

compound medicines or medicinable compositions or shall deliberately or negligently falsely unfaithfully fraudulently or unduly make mix compound prepare give apply or administer or any way sell set on sale put forth or put to sale to any person or persons whatever any medicines compound medicines or medicinable compositions as directed by any prescription order or receipt signed with the initials in his own handwriting of any physician so lawfully licensed to practise physic, such person or persons so offending shall upon complaint made within twenty one days by such physician and upon conviction of such offence before any of His Majesty's Justices of the Peace, unless such offender can show some satisfactory reason excuse or justification in this behalf, forfeit—for the first offence the sum of five pounds; for the second offence the sum of ten pounds; and for the third offence he shall forfeit his certificate and be rendered incapable in future of using or exercising the art and mystery of an apothecary and be liable to the penalty inflicted by the Act upon all who practise as such without a certificate in the same manner as if such party so convicted had never been furnished with a certificate enabling him to practise as an apothecary; and such offender so deprived of his certificate shall be rendered and deemed incapable in future of receiving and holding any fresh certificate unless the said party so applying for a renewal of his certificate shall faithfully promise and undertake and give good and sufficient security that he will not in future be guilty of the like offence.

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14. *(a) And to prevent any person or persons from practising as an apothecary without being properly qualified to practise as such* *BE IT FURTHER ENACTED, That from and after the 1st day of August, 1815,* it shall not be lawful for any person or persons (*except persons already in practice as such*) to practise as an apothecary in any part of England or Wales, unless he or they shall have been examined by the said Court of Examiners, or the major part of them, and have received a certificate of his or their being duly qualified to practise as such from the said Court of Examiners or the major part of them as aforesaid, who are hereby authorised and required to examine all person and persons applying to them, for the purpose of ascertaining the skill and abilities of such person or persons in the science and practice of medicine, and his or their fitness and qualification to practise as an apothecary, and the said court of examiners or the major part of them are hereby empowered either to reject

(a) The words in italics were repealed by the Statute Law Revision Act, 1890. See, as to this, *note* on page 337.

such person or persons, or to grant a certificate of such examination, and of his or their qualification to practise as an apothecary as aforesaid : Provided always that no person shall be admitted to such examination until he shall have attained the full age of twenty-one years.

* * * * *

20. (a) *And be it further enacted that* if any person (*except such as are then actually practising as such*) shall *after the 1st day of August, 1815*, act or practise as an apothecary in any part of England or Wales without having obtained such certificate as aforesaid, every person so offending shall, for every such offence, forfeit and pay the sum of twenty pounds ; and if any person (*except such as are then acting as such, and* excepting persons who have actually served an apprenticeship as aforesaid) shall *after the 1st day of August, 1815*, act as an assistant to any apothecary to compound and dispense medicines, without having obtained such certificate as aforesaid, every person so offending shall for every such offence forfeit and pay the sum of five pounds.

21. (a) *And be it further enacted that* no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial *that he was in practice as an apothecary prior to or on the said 5th [sic] day of August, 1815*, or that he has obtained a certificate to practise as an apothecary from the said Master, Wardens, and Society of Apothecaries as aforesaid.

* * * * *

29. (a) *Provided always and be it further enacted that* nothing in this Act contained shall extend or be construed to extend to lessen prejudice or defeat or in any wise to interfere with any of the rights authorities privileges and immunities heretofore vested in and exercised and enjoyed by either of the two Universities of Oxford and Cambridge, the Royal College of Physicians, the Royal College of Surgeons, or the said Society of Apothecaries respectively, other than and except such as shall or may have been altered varied or amended in and by this Act, *or of any person or persons practising as an apothecary previously to the 1st day of August 1815* ; but the said Universities Royal Colleges and the said Society and all such person or persons shall have use exercise and enjoy all such rights authorities privileges and immunities, save and except as aforesaid, in as full ample and beneficial a manner to all intents and purposes as they might have done before the passing of this Act and in case the same had never been passed.

THE PHARMACY ACT, 1852.

The first part of section 12 is as follows :—

12. From and after the passing of this Act, it shall not be lawful for any person, not being duly registered as a Pharmaceutical Chemist according to the provisions of this Act, to assume or use the title of Pharmaceutical Chemist or Pharmaceutist in any part of Great Britain, or to assume, use, or exhibit any name, title, or sign implying that he is registered under this Act, or that he is a Member of the said Society ; and if any person, not being duly registered under this Act, shall assume or use the title of Pharmaceutical Chemist or Pharmaceutist, or shall use, assume, or exhibit any name, title, or sign implying that he is a person registered under this Act, or that he is a Member of the said Society, every such person shall be liable to a penalty of five pounds.

Only one decision has been reported under this section, a very recent one, namely, *The Pharmaceutical Society of Great Britain v. Mercer*, decided in England by the Divisional Court on 28th October 1909 (a). Defendant, who was neither registered under the Act nor a member of the Society, carried on business as a vendor of medicine and had over his shop, and on the medicines he supplied, the words : “ R. Mercer & Co. “ The Pharmacy, Haydock.” An action was brought in the County Court to recover the penalty. The Judge held that the use of the word “ Pharmacy ” was the use of a sign implying that defendant was registered or was a member of the Society and imposed a penalty of five pounds. The Divisional Court, however, on appeal held that such use was not a description of the defendant but a description of the act done by him, namely, the selling of medicine, and allowed the appeal.

This decision was given after the judgment of the Court of Appeal in *Bellerby v. Heyworth* (ante, p. 313) which was considered by the Divisional Court to govern the case.

(a) [1910] 1 K. B. 74 ; 79 L. J. (K. B.) 50 ; 101 L. T. 635 ; 74 J. P. 26 ; 54 Sol. Jo. 33 ; 26 T. L. R. 35.

THE VETERINARY SURGEONS ACT, 1881.

The preamble to the Veterinary Surgeons Act, 1881, runs as follows :—

“WHEREAS it is expedient that provision be made to enable persons requiring the aid of a Veterinary Surgeon for the cure or prevention of diseases in or injuries to horses and other animals, to distinguish between qualified and unqualified practitioners : ”

Section 17 of the Act is as follows :—

“(1) If after the 31st day of December 1883 any person, other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine not exceeding twenty pounds.

(2) From and after the same day a person other than as in this section mentioned shall not be entitled to recover in any court any fee or charge for performing any veterinary operation, or for giving any veterinary attendance or advice, or for acting in any manner as a veterinary surgeon or veterinary practitioner, or for practising in any case veterinary surgery, or any branch thereof.”

It will be observed that this section closely corresponds to section 3 of the Dentists Act, the only material difference being that the name, title, addition or description must actually state, whereas in the Dentists Act it need only imply, that the person is a Veterinary Surgeon (or Dentist), &c.

Three decisions of the English Courts under the section are reported :—

The Royal College of Veterinary Surgeons v. Robinson was decided by the Divisional Court on 15th February 1892 (a). The

(a) [1892] 1 Q. B. 557 ; 61 L. J. (M. C.) 146 ; 66 L. T. 263 ; 56 J. P. 313 ; 40 W. R. 412 ; 17 Cox C. C. 477.

defendant, a shoeing smith, not on the Register of Veterinary Surgeons, had displayed on his premises and on bill-heads the words :—" J. Robinson, Veterinary Forge." The magistrate considered that the Act had not been infringed and dismissed the charge. The College appealed and the appeal was allowed. HAWKINS, J., said :—" It is true that the defendant did not profess " that he had himself any veterinary skill ; but no one seeing " those words ' Veterinary Forge ' could fail to come to the con- " clusion that he was carrying on at that forge a business which " in fact he was not specially qualified to carry on. This is, as " it seems to me, exactly a case to which the Act was intended " to apply. A man having no special qualification uses a phrase " in describing his business which would cause people to think " that he did possess a special qualification " ; and WILLS, J., said : " I think that the word ' qualified ' is used in the section " in its popular and not in its technical signification."

In *The Royal College of Veterinary Surgeons v. Collinson* (b) decided by the Divisional Court on 8th April 1908, the defendant had displayed upon a board the words " M. Collinson, canine " specialist. Dogs and Cats treated for all diseases." The Justices did not convict but the College successfully appealed to the Divisional Court. On the facts of the case, while LORD ALVERSTONE, L.C.J., thought it a clearer infringement of the Act than *Robinson's*, the other Judges, RIDLEY and DARLING, JJ., thought it a weaker case ; but they all agreed in their view of the meaning of the words " specially qualified to practise " and of the mischief at which the Act aimed. LORD ALVERSTONE said : " The section was intended to stop as far as possible persons " from treating animals for diseases unless they are qualified " veterinary surgeons, and to prevent unqualified persons from " treating them unless they really tell the public that they are " not veterinary surgeons. It seems to me that the words in the " notice before us do indicate that the respondent had the kind " of qualification which the statute says a person must not indicate " unless he has proper qualifications." And RIDLEY, J.—" It is " clear that the section was passed with a view of preventing a " person from practising as a veterinary surgeon unless he is one. " That is what it comes to. The words ' or is specially qualified " to practise ' are added out of caution in case there should be " some mode found by persons of escaping from the previous " more particular words." DARLING, J., also said : " The defendant

(b) [1908] 2 K. B. 248 ; 77 L. J. (K. B.) 689 ; 99 L. T. 122 ; 72 J. P. 267 ; 24 T. L. R. 530 ; 52 Sol. Jo. 457.

“claims to be a specialist to do with regard to dogs something which would cure them of diseases. That seems to me to come within the words of the section—specially qualified to practise veterinary surgery.”

In *Attorney-General v. Churchill's Veterinary Sanatorium, Limited and James Churchill* (c) decided in the Chancery Division by NEVILLE, J., on 21st July 1910, the defendant Churchill had registered the company and was its sole and managing director. The following notices were exhibited—“Churchill's Veterinary Sanatorium Limited” and “James Churchill, Managing Director, M.D. U.S.A., Specialist—Dogs and cats boarded. Advice gratis.”

It was held that the defendants were representing Churchill to be a practitioner of a branch of veterinary surgery in contravention of the section and an injunction was granted restraining both the company and Churchill from doing so.

THE MIDWIVES ACT, 1902.

The first part of the first section is :

1. (1) From and after the 1st day of April 1905, any woman who, not being certified under this Act, shall take or use the name or title of midwife (either alone or in combination with any other word or words), or any name, title, addition or description implying that she is certified under this Act or is a person specially qualified to practise midwifery or is recognised by law as a midwife, shall be liable on summary conviction to a fine not exceeding five pounds.

There is no reported decision upon this section.

SECTIONS OF THE MEDICAL AND DENTISTS ACTS CONSIDERED OR REFERRED TO IN THE DECISIONS

(See Index, under name of each Act)

THE MEDICAL ACT, 1858 (21 & 22 VICT. CAP. 90)
[passed 2nd August, 1858]

An Act to regulate the qualifications of practitioners
in medicine and surgery.

Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows : (a)

1. Short title.—This Act may for all purposes be cited as “The Medical Act.”

2. Commencement of Act.—This Act shall commence and take effect from the 1st day of October 1858.

3. Medical Council.—A Council which shall be styled “The General Council of Medical Education and Registration of the United Kingdom,” hereinafter referred to as the General Council, shall be established, and Branch Councils for England,

(a) The preamble was repealed by the Statute Law Revision Act, 1892.

Note.—All repealed portions of the Acts are printed in italics. It should, perhaps, be pointed out that a repeal which is effected by a Statute Law Revision Act is intended merely to disencumber the Statute Book of a superfluous or obsolete enactment ; it does not alter the law. All others are repeals of enactments actually in force at the time and which are often replaced by other provisions in the repealing statute. (See Craies, Statute Law, 2nd edit., pp. 320, &c.)

Scotland, and Ireland respectively formed thereout as hereinafter mentioned.

4. Members of Council.—*The General Council shall consist of one person chosen from time to time by each of the following Bodies ; (that is to say,)*

The Royal College of Physicians :

The Royal College of Surgeons of England :

The Apothecaries Society of London :

The University of Oxford :

The University of Cambridge :

The University of Durham :

The University of London :

The College of Physicians of Edinburgh :

The College of Surgeons of Edinburgh :

The Faculty of Physicians and Surgeons of Glasgow :

One person chosen from time to time by the University of Edinburgh and the two Universities of Aberdeen collectively :

One person chosen from time to time by the University of Glasgow and the University of Saint Andrews collectively :

One person chosen from time to time by each of the following Bodies :

The King and Queen's College of Physicians in Ireland :

The Royal College of Surgeons in Ireland :

The Apothecaries Hall of Ireland :

The University of Dublin :

The Queen's University in Ireland :

And six persons to be nominated by Her Majesty with the advice of Her Privy Council, four of whom shall be appointed for England, one for Scotland, and one for Ireland ; and of a President, to be elected by the General Council. (b)

* * * * *

6. Branches of the Council for England, Scotland, and Ireland.—

The members chosen by the medical corporations and universities of England, Scotland, and Ireland respectively, and the members nominated by Her Majesty, with the advice of Her Privy Council, for such parts respectively of the United Kingdom, shall be the Branch Councils for such parts respectively of the United Kingdom, to which Branch Councils shall be delegated such of the powers and duties vested in the Council as the Council may see fit other than the power to make representations to Her Majesty in Council as hereinafter mentioned : the President shall be a member of all the Branch Councils.

(b) This section was repealed by the Medical Act, 1886, and replaced by section 7 of that Act, *post*, page 360.

7. Qualification.—Members of the General Council representing the Medical Corporations must be qualified to be registered under this Act.

* * * * *

9. Time and place of meeting of the General Council.—The General Council *shall hold their first meeting within three months from the commencement of this Act, in such place and at such time as one of Her Majesty's Principal Secretaries of State shall appoint,* and (c) shall make such rules and regulations as to the times and places of the meetings of the General Council, and the mode of summoning the same, as to them shall seem expedient, which rules and regulations shall remain in force until altered at any subsequent meeting; and in the absence of any rule or regulation as to the summoning a meeting of the General Council, it shall be lawful for the President to summon a meeting at such time and place as to him shall seem expedient by letter addressed to each member; and at every meeting, in the absence of the President, some other member to be chosen from the members present shall act as President; and all acts of the General Council shall be decided by the votes of the majority of the members present at any meeting, the whole number present not being less than eight, and at all such meetings the President for the time being shall, in addition to his vote as a member of the Council, have a casting vote, in case of an equality of votes; and the General Council shall have power to appoint an Executive Committee out of their own body, of which the quorum shall not be less than three, and to delegate to such Committee such of the powers and duties vested in the Council as the Council may see fit, other than the power of making representations to Her Majesty in Council as hereinafter mentioned.

10. Appointment of Registrars and other officers.—The General Council shall appoint a Registrar, who shall act as Secretary of the General Council, and who may also act as Treasurer, unless the Council shall appoint another person or other persons as treasurer or treasurers; and the person or persons so appointed shall likewise act as registrar for England, and as secretary and treasurer or treasurers, as the case may be, for the Branch Council for England; the General Council and Branch Council for England shall also appoint so many clerks and servants as shall be necessary for the purposes of this Act; and every person so appointed by any Council shall be removable at

(c) The words in italics were repealed by the Statute Law Revision Act, 1892.

the pleasure of that Council, and shall be paid such salary as the Council by which he was appointed shall think fit.

11. Appointment of Registrars and other officers by Branch Councils.—The Branch Councils for Scotland and Ireland shall each respectively in like manner appoint a Registrar and other officers and clerks, who shall be paid such salaries as such Branch Councils respectively shall think fit, and be removable at the pleasure of the Council by which they were appointed; and the person appointed Registrar shall also act as Secretary to the Branch Council, and may also act as Treasurer, unless the Council shall appoint some other person or persons as treasurer or treasurers.

* * * * *

14. Duty of Registrar to keep the register correct.—It shall be the duty of the Registrars to keep their respective Registers correct in accordance with the provisions of this Act, and the orders and regulations of the General Council, and to erase the names of all registered persons who shall have died, and shall from time to time make the necessary alterations in the addresses or qualifications of the persons registered under this Act; and to enable the respective Registrars duly to fulfil the duties imposed upon them it shall be lawful for the Registrar to write a letter to any registered person, addressed to him according to his address on the Register, to inquire whether he has ceased to practise, or has changed his residence, and if no answer shall be returned to such letter within the period of six months from the sending of the letter it shall be lawful to erase the name of such person from the Register; provided always, that the same may be restored by direction of the General Council should they think fit to make an order to that effect.

15. Registration of persons now qualified, and of persons hereafter becoming qualified.—Every person now possessed, and (subject to the provisions hereinafter contained) every person hereafter becoming possessed, of any one or more of the qualifications described in the Schedule (A.) to this Act, shall, on payment of a fee, not exceeding two pounds, in respect of qualifications obtained before the 1st day of January 1859, and not exceeding five pounds in respect of qualifications obtained on or after that day, be entitled to be registered on producing to the Registrar of the Branch Council for England, Scotland, or Ireland the document conferring or evidencing the qualification or each of the qualifications in respect whereof he seeks to be so registered, or upon transmitting by post to such Registrar information of his name and address, and evidence of the qualification or qualifica-

tions in respect whereof he seeks to be registered, and of the time or times at which the same was or were respectively obtained : Provided always, that it shall be lawful for the several Colleges and other Bodies mentioned in the said Schedule (A.) to transmit from time to time to the said Registrar lists certified under their respective seals of the several persons who, in respect of qualifications granted by such Colleges and Bodies respectively, are for the time being entitled to be registered under this Act, stating the respective qualifications and places of residence of such persons ; and it shall be lawful for the Registrar thereupon, and upon payment of such fee as aforesaid in respect of each person to be registered, to enter in the Register the persons mentioned in such lists, with their qualifications and places of residence as therein dated, without other application in relation thereto.

16. Council to make Orders for regulating registers to be kept.—The General Council shall, with all convenient speed after the passing of this Act, and from time to time as occasion may require, make orders for regulating the Registers to be kept under this Act as nearly as conveniently may be in accordance with the form set forth in Schedule (D.) to this Act, or to the like effect.

17. Persons practising in England before 1st August 1815 entitled to be registered.—*Any person who was actually practising medicine in England before the 1st day of August 1815 shall, on payment of a fee to be fixed by the General Council, be entitled to be registered on producing to the Registrar of the Branch Council for England, Scotland, or Ireland a declaration according to the form in the Schedule (B.) to this Act signed by him, or upon transmitting to such Registrar information of his name and address, and enclosing such declaration as aforesaid. (d)*

18. Council may require information as to course of study, &c., required for obtaining qualifications.—The several Colleges and Bodies in the United Kingdom mentioned in Schedule (A.) to this Act shall from time to time, when required by the General Council, furnish such Council with such information as they may require as to the courses of study and examinations to be gone through in order to obtain the respective qualifications mentioned in Schedule (A.) to this Act, and the ages at which such courses of study and examination are required to be gone through, and such qualifications are conferred, and generally as to the requisites for obtaining such qualifications ; and any member or members of the General Council, or any person or persons deputed for this

(d) This section was repealed by the Statute Law Revision Act, 1875.

purpose by such Council, or by any Branch Council, may attend and be present at any such examinations.

19. Colleges may unite in conducting examinations.—Any two or more of the Colleges and Bodies in the United Kingdom mentioned in Schedule (A.) to this Act may, with the sanction and under the directions of the General Council, unite or co-operate in conducting the examinations required for qualifications to be registered under this Act.

20. Defects in the course of study or examinations may be represented by General Council to Privy Council.—In case it appear to the General Council that the course of study and examinations to be gone through in order to obtain any such qualification from any such College or Body are not such as to secure the possession by persons obtaining such qualification of the requisite knowledge and skill for the efficient practice of their profession, it shall be lawful for such General Council to represent the same to Her Majesty's most Honourable Privy Council.

21. Privy Council may suspend the right of registration in respect of qualifications granted by College, &c., in default, but may be revoked.—It shall be lawful for the Privy Council, upon any such representation as aforesaid, if it see fit, to order that any qualification granted by such College or Body, after such time as may be mentioned in the order, shall not confer any right to be registered under this Act: Provided always, that it shall be lawful for Her Majesty, with the advice of Her Privy Council, when it is made to appear to Her, upon further representation from the General Council or otherwise, that such College or Body has made effectual provision, to the satisfaction of such General Council, for the improvement of such course of study or examinations, or the mode of conducting such examinations, to revoke any such order.

* * * * *

25. As to registration by Branch Registrars.—Where any person entitled to be registered under this Act applies to the Registrar of any of the said Branch Councils for that purpose, such Registrar shall forthwith enter in a Local Register in the form set forth in Schedule (D.) to this Act, or to the like effect, to be kept by him for that purpose, the name and place of residence, and the qualification or several qualifications in respect of which the person is so entitled, and the date of the registration, and shall, in the case of the Registrar of the Branch Council for Scotland or Ireland, with all convenient speed send to the Registrar of the

General Council a copy, certified under the hand of the Registrar, of the entry so made, and the Registrar of the General Council shall forthwith cause the same to be entered in the General Register; and such Registrar shall also forthwith cause all entries made in the Local Register for England to be entered in the General Register; and the entry on the General Register shall bear date from the Local Register.

26. Evidence of qualification to be given before registration.—No qualification shall be entered on the Register, either on the first registration or by way of addition to a registered name, unless the Registrar be satisfied by the proper evidence that the person claiming is entitled to it; and any appeal from the decision of the Registrar may be decided by the General Council, or by the Council for England, Scotland, or Ireland (as the case may be); and any entry which shall be proved to the satisfaction of such General Council or Branch Council to have been fraudulently or incorrectly made may be erased from the Register by order in writing of such General Council or Branch Council.

27. Register to be published.—The Registrar of the General Council shall in every year cause to be printed, published, and sold, under the direction of such Council, a correct Register of the names in alphabetical order according to the surnames, with the respective residences, in the form set forth in Schedule (D.) to this Act, or to the like effect, and medical titles, diplomas, and qualifications conferred by any Corporation or University, or by doctorate of the Archbishop of Canterbury, with the dates thereof, of all persons appearing on the General Register as existing on the 1st day of January in every year; and such Register shall be called "The Medical Register;" and a copy of the Medical Register for the time being, purporting to be so printed and published as aforesaid, shall be evidence in all Courts and before all Justices of the Peace and others that the persons therein specified are registered according to the provisions of this Act; and the absence of the name of any person from such copy shall be evidence, until the contrary be made to appear, that such person is not registered according to the provisions of this Act: Provided always, that in the case of any person whose name does not appear in such copy, a certified copy, under the hand of the Registrar of the General Council or of any Branch Council, of the entry of the name of such person on the General or Local Register shall be evidence that such person is registered under the provisions of this Act.

28. Names of members struck off from list of College, &c., to be signified to General Council.—If any of the said Colleges or the

said Bodies at any time exercise any power they possess by law of striking off from the list of such College or Body the name of any one of their members, such College or Body shall signify to the General Council the name of the member so struck off; and the General Council may, if they see fit, direct the Registrar to erase forthwith from the Register the qualification derived from such College or Body in respect of which such member was registered, and the Registrar shall note the same therein: Provided always that the name of no person shall be erased from the Register on the ground of his having adopted any theory of medicine or surgery.

29. Medical practitioners convicted of felony may be struck off the Register.—If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the Registrar to erase the name of such medical practitioner from the Register.

30. Registered persons may have subsequent qualifications inserted in the Register.—Every person registered under this Act who may have obtained any higher degree or any qualification other than the qualification in respect of which he may have been registered, shall be entitled to have such higher degree or additional qualification inserted in the Register in substitution for or in addition to the qualification previously registered, on payment of such fee as the Council may appoint.

31. Privileges of registered persons.—*Every person registered under this Act shall be entitled according to his qualification or qualifications to practise medicine or surgery, or medicine and surgery, as the case may be, in any part of Her Majesty's Dominions, and to demand and recover in any Court of Law with full costs of suit, reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients: Provided always, that it shall be lawful for any College of Physicians to pass a byelaw to the effect that no one of their Fellows or Members shall be entitled to sue in manner aforesaid in any Court of Law, and thereupon such byelaw may be pleaded in bar to any action for the purposes aforesaid commenced by any Fellow or Member of such College. (e)*

32. None but registered persons to recover charges.—*After the*

(e) Repealed by the Medical Act, 1886, and replaced by section 6 of that Act.

First Day of January 1859 (f) no person shall be entitled to recover any charge in any Court of Law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act.

* * * * *

34. Meaning of terms “legally qualified medical practitioner,” &c.—*After the First Day of January 1859 (f)* the words “legally qualified medical practitioner” or “duly qualified medical practitioner,” or any words importing a person recognised by law as a medical practitioner or member of the medical profession, when used in any Act of Parliament, shall be construed to mean a person registered under this Act.

35. Registered persons exempted from serving on juries, &c.—Every person who shall be registered under the provisions of this Act shall be exempt, if he shall so desire, from serving on all juries and inquests whatsoever, and from serving all corporate, parochial, ward, hundred and township offices, and from serving in the militia, and the name of such person shall not be returned in any list of persons liable to serve in the militia, or in any such office as aforesaid.

36. Unregistered persons not to hold certain appointments.—*After the First Day of January 1859 (f)* no person shall hold any appointment as a physician, surgeon, or other medical officer either in the military or naval service, or in emigrant or other vessels, or in any hospital, infirmary, dispensary, or lying-in hospital, not supported wholly by voluntary contributions, or in any lunatic asylum, gaol, penitentiary, house of correction, house of industry, parochial or union workhouse or poorhouse, parish union, or other public establishment, body, or institution, or to any friendly or other society for affording mutual relief in sickness, infirmity, or old age, or as a medical officer of health, unless he be registered under this Act: Provided always, that nothing in this Act contained shall extend to repeal or alter any of the provisions of the Passengers’ Act, 1855 (g).

37. No certificate be valid unless person signing be registered.—*After the First Day of January 1859 (f)* no certificate required by any Act now in force, or that may hereafter be passed, from any physician, surgeon, licentiate in medicine and surgery, or

(f) By amending Acts (1859, 1860) the date was altered, first to July 1859 and finally to 1st January 1861. The words in italics were repealed by the Statute Law Revision Act, 1875.

(g) Now included in the Merchant Shipping Act, 1894.

other medical practitioner, shall be valid unless the person signing the same be registered under this Act.

* * * *

39. Penalty for obtaining registration by false representations.— If any person shall wilfully procure or attempt to procure himself to be registered under this Act, by making or producing or causing to be made or produced any false or fraudulent representation or declaration, either verbally or in writing, every such person so offending, and every person aiding and assisting him therein, shall be deemed guilty of a misdemeanor in England and Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be sentenced to be imprisoned for any term not exceeding twelve months. (*h*)

40. Penalty for falsely pretending to be a registered person.— Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding twenty pounds.

* * * *

42. Application of penalties.— Any sum or sums of money arising from conviction and recovery of penalties as aforesaid shall be paid to the Treasurer of the General Council. (*i*)

* * * *

46. Provision for persons practising in the Colonies and elsewhere, and for students.— It shall be lawful for the General Council by special orders to dispense with such provisions of this Act or with such part of any regulations made by its authority as to them shall seem fit, in favour of persons now practising medicine or surgery in any part of Her Majesty's Dominions other than Great Britain and Ireland by virtue of any of the qualifications described in Schedule (A.); and also in favour of persons practising medicine or surgery within the United Kingdom on

(*h*) This section has been repealed as regards England by the Perjury Act, 1911. Fraudulent registration is now punishable under sections 6 and 7 of that Act—*post*, page 363.

(*i*) Penalties in respect of convictions within the Metropolitan Police District are, however, by virtue of section 47 of the Metropolitan Police Courts Act, 1839, paid to the Receiver of the District.

foreign or colonial diplomas or degrees before the passing of this Act; and also in favour of any persons who have held appointments as surgeons or assistant surgeons in the army, navy, or militia, or in the service of the East India Company, or are acting as surgeons in the public service, or in the service of any charitable institutions, and also, so far as to the Council shall seem expedient, in favour of medical students who shall have commenced their professional studies before the passing of this Act.

* * * * *

SCHEDULE (A.)

1. Fellow, (*j*) Licentiate, or Extra Licentiate of the Royal College of Physicians of London.

2. Fellow, (*j*) or Licentiate of the Royal College of Physicians of Edinburgh.

3. Fellow or Licentiate of the King's and Queen's College of Physicians of Ireland. (*k*)

4. Fellow or Member or Licentiate in Midwifery of the Royal College of Surgeons of England.

5. Fellow or Licentiate of the Royal College of Surgeons of Edinburgh.

6. Fellow or Licentiate of the Faculty of Physicians and Surgeons of Glasgow. (*l*)

7. Fellow or Licentiate of the Royal College of Surgeons in Ireland.

8. Licentiate of the Society of Apothecaries, London.

9. Licentiate of the Apothecaries Hall, Dublin.

10. Doctor, or Bachelor, or Licentiate of Medicine, or Master in Surgery of any University of the United Kingdom; or Doctor of Medicine by doctorate granted prior to passing of this Act by the Archbishop of Canterbury.

11. Doctor of Medicine of any Foreign or Colonial University or College, practising as a physician in the United Kingdom before the 1st Day of October, 1858, who shall produce certificates to the satisfaction of the Council of his having taken his degree of Doctor of Medicine after regular examination, or who shall satisfy the Council, under Section 45 (*m*) of this Act, that there is sufficient reason for admitting him to be registered.

* * * * *

(*j*) "Member" added by the Medical Act, 1859.

(*k*) Now the Royal College of Physicians of Ireland.

(*l*) Now the Royal Faculty of Physicians and Surgeons of Glasgow.

(*m*) Corrected to 46 by the Medical Act, 1859.

SCHEDULE (D.)

Name.	Residence.	Qualification.	Title (n).
A. B. -	London -	Fellow of the Royal College of Physicians of	
C. D. -	Edinburgh	Fellow and Member of the Royal College of Surgeons of	
E. F. -	Dublin -	Graduate in Medicine of University of	
G. H. -	Bristol -	Licentiate of the Society of Apothecaries.	
I. K. -	London -	Member of College of Surgeons and Licentiate of the Society of Apothecaries.	

THE MEDICAL ACT, 1859 (22 VICT. CAP. 21)

[passed 19th April, 1859]

* * * * *

6. Any person not a British subject having obtained his degree or diploma may act as resident physician, &c., of any hospital exclusively for foreigners.—Nothing in the said Act (*a*) contained shall prevent any person not a British subject who shall have obtained from any foreign university a degree or diploma of doctor in medicine, and who shall have passed the regular examinations entitling him to practise medicine in his own country, from being and acting as the resident physician or medical officer of any hospital established exclusively for the relief of foreigners in sickness: Provided always, that such person is engaged in no medical practice except as such resident physician or medical officer.

* * * * *

(*n*) This heading is repealed, and column omitted, by the Medical Act, 1859.

(*a*) I.e., the Medical Act, 1858.

THE DENTISTS ACT, 1878 (41 & 42 VICT. CAP. 33)
[passed 22nd July, 1878]

An Act to amend the law relating to dental practitioners.

Whereas it is expedient that provision be made for the registration of persons specially qualified to practise as dentists in the United Kingdom, and that the law relating to persons practising as dentists be otherwise amended :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows : (a)

1. Short title.—This Act may for all purposes be cited as the Dentists Act, 1878.

2. Interpretation.—In this Act “General Council” means the General Council of Medical Education and Registration of the United Kingdom, established under the Medical Act, 1858; and “Branch Council” means a branch of the said council as constituted by the same Act :

“General registrar” means the person appointed to be the registrar by the General Council, and “local registrar” means the registrar appointed by a branch council under the Medical Act, 1858 :

“British possession” means any part of her Majesty's dominions exclusive of the United Kingdom :

“Medical authorities” means the bodies and universities who choose members of the General Council.

3. Penalty on unregistered persons using title of “dentist,” &c.—*From and after the 1st day of August 1879 (a) a person shall not be entitled to take or use the name or title of “dentist” (either alone or in combination with any other word or words), or of “dental practitioner,” or any name, title, addition, or description (b) implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.*

(a) The words in italics were repealed by the Statute Law Revision Act, 1894.

(b) See also as to “title, addition or description,” Medical Act, 1886, s. 26, *post*, page 361.

Any person who, *after the 1st day of August 1879* (c), not being registered under this Act, takes or uses any such name, title, addition, or description as aforesaid, shall be liable, on summary conviction, to a fine not exceeding twenty pounds; provided that nothing in this section shall apply to legally qualified medical practitioners.

4. Provision as to offence of unregistered person taking name, &c., and as to offence of person taking title he does not possess.—With respect to the offence of a person not registered under this Act taking or using any name, title, addition, or description as above in this Act mentioned, the following provisions shall have effect:

(1.) He shall not be guilty of an offence under this Act—

(a.) If he shows that he is not ordinarily resident in the United Kingdom and that he holds a qualification which entitles him to practise dentistry or dental surgery in a British possession or foreign country, and that he did not represent himself to be registered under this Act; or,

(b.) If he shows that he has been registered and continues to be entitled to be registered under this Act, but that his name has been erased on the ground only that he has ceased to practise.

(2.) *A prosecution for such offence shall be instituted only as hereinafter mentioned.* (c)

If a person takes or uses the designation of any qualification or certificate in relation to dentistry or dental surgery which he does not possess, he shall be liable, on summary conviction *on such prosecution as hereinafter mentioned*, (c) to a fine not exceeding twenty pounds.

A prosecution for any of the offences above in this Act mentioned *shall not be instituted by a private person, except with the consent of the General Council, or of a branch council, but* (d) may be instituted by the General Council, by a branch council, or by a medical authority, if such Council or authority think fit. (e)

5. Privileges of registered persons.—A person registered under this Act shall be entitled to practise dentistry and dental surgery in any part of Her Majesty's dominions (f) and *from and after the 1st day of August 1879* (c) a person shall not be

(c) The words in italics were repealed by the Statute Law Revision Act, 1894.

(d) The words in italics were repealed by the Medical Act, 1886, s. 26, *post*, page 361.

(e) Or by a private person (Medical Act, 1886, s. 26).

(f) But, if outside the United Kingdom, subject to any local law in force in that part (Medical Act, 1886, s. 26).

entitled to recover any fee or charge, in any court, for the performance of any dental operation or for any dental attendance or advice, unless he is registered under this Act or is a legally qualified medical practitioner.

6. Qualification necessary for registration.—Any person who—

- (a.) Is a licentiate in dental surgery or dentistry of any of the medical authorities ; or,
- (b.) Is entitled as herein-after mentioned to be registered as a foreign or colonial dentist ; or,
- (c.) Is at the passing of this Act *bonâ fide* engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy,

shall be entitled to be registered under this Act.

7. Registration of persons in dentists register.—Where a person entitled to be registered under this Act produces or sends to the general registrar the document conferring or evidencing his licence or qualification, with a statement of his name and address, and the other particulars, if any, required for registration, and pays the registration fee, he shall be registered in the dentists register.

Provided that a person shall not be registered under this Act as having been at the passing thereof engaged in the practice of dentistry unless he produces or transmits to the registrar, before the 1st day of August 1879, information of his name and address, and a declaration signed by him in the form in the schedule to this Act or to the like effect ; and the registrar may, if he sees fit, require the truth of such declaration to be affirmed in manner provided by the Act of the session held in the 5th and 6th years of the reign of King William the Fourth, chapter 62, intituled “ An Act to repeal an Act of the “ present session of Parliament, intituled ‘ An Act for the more “ effectual abolition of oaths and affirmations taken and made in “ various departments of the State, and to substitute declarations “ in lieu thereof, and for the more entire suppression of voluntary “ and extra-judicial oaths and affidavits,’ and to make other provisions for the abolition of unnecessary oaths.” (g)

A person resident in the United Kingdom shall not be disqualified for being registered under this Act by reason that he is not a British subject ; and a British subject shall not be disqualified for being registered under this Act by reason of his being resident or engaged in practice beyond the limits of the United Kingdom.

(g) The words in italics were repealed by the Statute Law Revision Act, 1894, which, however, does not expressly repeal the Schedule.

8. Registration of colonial dentist with recognized certificate.—

Where a person who either is not domiciled in the United Kingdom, or has practised for more than ten years elsewhere than in the United Kingdom, or in the case of persons practising in the United Kingdom at the time of the passing of this Act for not less than ten years either in the United Kingdom or elsewhere, shows that he holds some recognized certificate (as hereinafter defined) granted in a British possession, and that he is of good character, such person shall upon payment of the registration fee be entitled, without examination in the United Kingdom, to be registered as a colonial dentist in the dentists register.

9. Registration of foreign dentist with recognized certificate.—

Where a person who is not a British subject, or who has practised for more than ten years elsewhere than in the United Kingdom, or in the case of persons practising in the United Kingdom at the time of the passing of this Act for not less than ten years either in the United Kingdom or elsewhere, shows that he obtained some recognized certificate (as hereinafter defined) granted in a foreign country, and that he is of good character, and either continues to hold such certificate, or has not been deprived thereof for any cause which disqualifies him for being registered under this Act, such person shall upon payment of the registration fee be entitled, without examination in the United Kingdom, to be registered as a foreign dentist in the dentists register.

10. Recognized certificates of colonial and foreign dentist.—

The certificate granted in a British possession or in a foreign country, which is to be deemed such a recognized certificate as is required for the purposes of this Act, shall be such certificate, diploma, membership, degree, licence, letters testimonial, or other title, status, or document as may be recognized for the time being by the General Council as entitling the holder thereof to practise dentistry or dental surgery in such possession or country, and as furnishing sufficient guarantees of the possession of the requisite knowledge and skill for the efficient practice of dentistry or dental surgery.

If a person is refused registration as a colonial dentist or as a foreign dentist, the general registrar shall, if required by him, state in writing the reason for such refusal, and if such reason be that the certificate held or obtained by him is not such a recognized certificate as above defined, such person may appeal to the Privy Council, and the Privy Council, after hearing the General Council, may dismiss the appeal or may order the General Council to recognize such certificate, and such order shall be duly obeyed.

11. Contents and form of dentists register and other provisions as to register.—(1.) A register shall be kept by the general registrar to be styled the dentists register; and that register shall—

(a.) Contain in one alphabetical list all United Kingdom dentists, that is to say, all persons who are registered under this Act as having been at the passing thereof engaged in the practice of dentistry or dental surgery, and all persons who are registered as licentiates in dentistry or dental surgery of any of the medical authorities of the United Kingdom; and,

(b.) Contain in a separate alphabetical list all such colonial dentists as are registered in pursuance of this Act; and,

(c.) Contain in a separate alphabetical list all such foreign dentists as are registered in pursuance of this Act.

(2.) The dentists register shall contain the said lists made out alphabetically according to the surnames, and shall state the full names and addresses of the registered persons, the description and date of the qualifications in respect of which they are registered, and, subject to the provisions of this Act, shall contain such particulars and be in such form as the General Council from time to time direct.

(3.) The General Council shall cause a correct copy of the dentists register to be from time to time and at least once a year printed under their direction, and published and sold, which copy shall be admissible in evidence.

(4.) The dentists register shall be deemed to be in proper custody when in the custody of the general registrar, and shall be of such a public nature as to be admissible as evidence of all matters therein on its mere production from that custody.

(5.) Every local registrar shall keep such register and perform such duties in relation to registration under this Act as the General Council from time to time direct, and receive such remuneration out of the registration fees as the General Council assign him.

Every registrar shall in all respects in the execution of his discretion and duty in relation to any register under this Act, conform to any orders made by the General Council under this Act, and to any special directions given by the General Council.

(6.) The General Council may, if they think fit, from time to time make, and when made, revoke and vary, orders for the registration in (on payment of the fee fixed by the orders) and the removal from the dentists register of any additional diplomas, memberships, degrees, licences, or letters held by a person registered therein, which appear to the Council to be granted after

examination by any of the medical authorities in respect of a higher degree of knowledge than is required to obtain a certificate of fitness under this Act.

12. Correction of dentists register.—(1.) The general registrar shall from time to time insert in the dentists register any alteration which may come to his knowledge in the name or address of any person registered.

(2.) The general registrar shall erase from the dentists register the name of every deceased person.

(3.) The general registrar may erase from the dentists register the name of a person who has ceased to practise, but not (save as hereinafter provided) without the consent of that person; and the general registrar may send by post to a person registered in the dentists register a notice inquiring whether or not he has ceased to practise, or has changed his residence; and if the general registrar does not, within three months after sending the notice, receive any answer thereto from the said person, he may, within fourteen days after the expiration of the three months, send him by post in a registered letter another notice, referring to the first notice, and stating that no answer thereto has been received by the registrar, and if the general registrar either before the second notice is sent receives the first notice back from the dead letter office of the Postmaster General, or receives the second notice back from that office, or does not within three months after sending the second notice receive any answer thereto from the said person, that person shall, for the purpose of the present section, be deemed to have ceased to practise and his name may be erased accordingly.

(4.) In the execution of his duties the general registrar shall act on such evidence as in each case appears sufficient.

13. Erasing from dentists register name of practitioner convicted of crime or guilty of disgraceful conduct.—The General Council shall cause to be erased from the dentists register any entry which has been incorrectly or fraudulently made.

Where a person registered in the dentists register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in Her Majesty's dominions or elsewhere of an offence which, if committed in England, would be a felony or misdemeanor, or been guilty of any infamous or disgraceful conduct in a professional respect, that person shall be liable to have his name erased from the register.

The General Council may, and upon the application of any of the medical authorities shall, cause inquiry to be made into the case of a person alleged to be liable to have his name erased

under this section, and, on proof of such conviction or of such infamous or disgraceful conduct, shall cause the name of such person to be erased from the register :

Provided that the name of a person shall not be erased under this section on account of his adopting or refraining from adopting the practice of any particular theory of dentistry or dental surgery, nor on account of a conviction for a political offence out of Her Majesty's dominions, nor on account of a conviction for an offence which, though within the provisions of this section, does not, either from the trivial nature of the offence or from the circumstances under which it was committed, disqualify a person for practising dentistry.

Any name erased from the register in pursuance of this section shall also be erased from the list of licentiates in dental surgery or dentistry of the medical authority of which such person is a licentiate.

14. Restoration of name to dentists register.—Where the General Council direct the erasure from the dentists register of the name of any person, or of any other entry, the name of that person, or that entry, shall not be again entered in the register, except by direction of the General Council, or by order of a court of competent jurisdiction.

If the General Council think fit in any case, they may direct the general registrar to restore to the dentists register any name or entry erased therefrom, either without fee or on payment of such fee, not exceeding the registration fee, as the General Council from time to time fix, and the registrar shall restore the same accordingly.

The name of any person erased from the dentists register at the request of such person or with his consent shall, unless it might, if not so erased, have been erased by order of the General Council, be restored to the register on his application, on payment of such fee not exceeding the registration fee as the General Council from time to time fix.

Where the name of a person restored to the register in pursuance of this section has been erased from the list of licentiates in dental surgery or dentistry of any medical authority, that name shall be restored to such list of licentiates.

15. Committee of General Council for purpose of erasure from and restoration to the register.—The General Council shall for the purpose of exercising in any case the powers of erasing from and of restoring to the dentists register the name of a person or an entry, ascertain the facts of such case by a committee of their own body, not exceeding five in number, of whom the

quorum shall be not less than three, and a report of the committee shall be conclusive as to the facts for the purpose of the exercise of the said powers by the General Council.

The General Council shall from time to time appoint and shall always maintain a committee for the purposes of this section, and subject to the provisions of this section may from time to time determine the constitution, and the number and tenure of office of the members, of the committee.

The committee from time to time shall meet for the despatch of business, and subject to the provisions of this section, and of any regulations from time to time made by the General Council, may regulate the summoning, notice, place, management, and adjournment of such meetings, the appointment of a chairman, the mode of deciding questions, and generally the transaction and management of business, including the quorum, and if there is a quorum the committee may act notwithstanding any vacancy in their body. In the case of any vacancy the committee may appoint a member of the General Council to fill the vacancy until the next meeting of that Council.

A committee under this section may, for the purpose of the execution of their duties under this Act, employ at the expense of the Council such legal or other assessor or assistants as the committee think necessary or proper.

* * * * *

18. Examinations in dental surgery.—Notwithstanding anything in any Act of Parliament, charter, or other document, it shall be lawful for any of the medical authorities (hereinafter referred to as colleges or bodies) who have power for the time being to grant surgical degrees, from time to time to hold examinations for the purpose of testing the fitness of persons to practise dentistry or dental surgery who may be desirous of being so examined, and to grant certificates of such fitness; and any person who obtains such a certificate from any of those colleges or bodies shall be a licentiate in dental surgery or dentistry of such college or body, and his name shall be entered on a list of such licentiates to be kept by such college or body.

Each of the said colleges or bodies shall admit to the examinations held by them respectively under this section any person desirous of being examined who has attained the age of twenty-one years, and has complied with the regulations in force (if any) as to education of such college or body.

* * * * *

27. Saving as to registration under 21 & 22 Viet. c. 90.—A certificate under this Act shall not confer any right or title to be regis-

tered under the Medical Act, 1858, in respect of such certificate, nor to assume any name, title, or designation implying that the person mentioned in the certificate is by law recognised as a licentiate or practitioner in medicine or general surgery.

* * * *

35. Penalty for obtaining registration by false representations.—

Any person who wilfully procures or attempts to procure himself to be registered under this Act, by making or producing, or causing to be made or produced, any false or fraudulent representation or declaration, either verbally or in writing, and any person aiding and assisting him therein, shall be deemed guilty of a misdemeanor in England and Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be liable to be imprisoned for any term not exceeding twelve months. (*h*)

* * * *

37. Provision for certain students.—Any person who has been articulated as a pupil and has paid a premium to a dental practitioner entitled to be registered under this Act in consideration of receiving from such practitioner a complete dental education, shall, if his articles expire before the 1st day of January 1880, be entitled to be registered under this Act as though he had been in bonâ fide practice before the passing of this Act: Moreover it shall be lawful for the General Council by special order to dispense with such of the certificates, examinations, or other conditions for registration in the dentists register required under the provisions of this Act, or under any byelaws, orders, or regulations made by its authority, as to them may seem fit, in favour of any dental students or apprentices who have commenced their professional education or apprenticeship before the passing of this Act.

The SCHEDULE. [See note (*g*) ante, page 351].

Declaration required to be made by a person who claims to be registered under the Dentists Act, 1878, on the ground that he was bonâ fide engaged in the practice of dentistry at the date of the passing of the Dentists Act, 1878.

I, _____, residing at _____

(*h*) This section has been repealed as regards England by the Perjury Act, 1911. Fraudulent registration is now punishable under sections 6 and 7 of that Act. See *post* page 363.

hereby declare that I was *bonâ fide* engaged in the practice of dentistry at
 , at the date of the passing of the Dentists Act, 1878.

(Signed)

(Witness)

Dated this

day of

18 .

Note.—Any person who wilfully procures or attempts to procure himself to be registered under this Act, by making or producing, or causing to be made or produced, any false or fraudulent representation or declaration, either verbally or in writing, and any person aiding and assisting him therein, is liable under the Dentists Act, 1878, to imprisonment for twelve months.

THE MEDICAL ACT, 1886 (49 & 50 VICT. CAP. 48) [passed 25th June, 1886]

An Act to amend the Medical Acts.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Short title and construction.—This Act may be cited as the Medical Act, 1886, and shall be construed as one with the Medical Acts.

2. Examination before registration.—On and after the appointed day a person shall not be registered under the Medical Acts in respect of any qualification referred to in any of those Acts, unless he has passed such qualifying examination in medicine, surgery and midwifery, as is in this Act mentioned.

3. Qualifying examinations held by medical authorities.—(1.) A qualifying examination shall be an examination in medicine, surgery, and midwifery held, for the purpose of granting a diploma or diplomas conferring the right of registration under the Medical Acts, by any of the following bodies, that is to say :—

(a.) Any university in the United Kingdom or any medical corporation, legally qualified at the passing of this Act to grant such diploma or diplomas in respect of medicine and surgery ; or

(b.) Any combination of two or more medical corporations in the same part of the United Kingdom who may agree to hold a joint examination in medicine, surgery, and midwifery, and of whom one at least is capable of granting such diploma as aforesaid in respect of medicine, and one at least is capable of granting such diploma in respect of surgery ; or

(c.) Any combination of any such university as aforesaid with any other such university or universities, or of any such university or universities with a medical corporation or corporations, the bodies forming such combination being in the same part of the United Kingdom.

(2.) The standard of proficiency required from candidates at the said qualifying examinations shall be such as sufficiently to guarantee the possession of the knowledge and skill requisite for the efficient practice of medicine, surgery, and midwifery; and it shall be the duty of the General Council to secure the maintenance of such standard of proficiency as aforesaid; and for that purpose such number of inspectors as may be determined by the General Council shall be appointed by the General Council, and shall attend, as the General Council may direct, at all or any of the qualifying examinations held by any of the bodies aforesaid.

(3.) Inspectors of examinations appointed under this section shall not interfere with the conduct of any examination, but it shall be their duty to report to the General Council their opinion as to the sufficiency or insufficiency of every examination which they attend, and any other matters in relation to such examination which the General Council may require them to report; and the General Council shall forward a copy of every such report to the body or to each of the bodies which held the examination in respect of which the said report was made, and shall also forward a copy of such report, together with any observations thereon made by the said body or bodies, to the Privy Council.

(4.) An inspector of examinations appointed under this section shall receive such remuneration, to be paid as part of the expenses of the General Council, as the General Council, with the sanction of the Privy Council, may determine.

* * * * *

6. Privileges of registered persons.—*On and after the appointed day* (a) a registered medical practitioner shall, save as in this Act mentioned, be entitled to practise medicine, surgery, and midwifery in the United Kingdom, and (subject to any local law) in any other part of Her Majesty's dominions, and to recover in due course of law in respect of such practice any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled, unless he is a fellow of a college of physicians, the fellows of which are prohibited by byelaw from recovering at law their expenses, charges, or fees, in which case such prohibitory byelaw, so long as it is in force, may be pleaded in bar of any legal proceedings instituted by such fellow for the recovery of expenses, charges, or fees.

(a) The words in italics were repealed by the Statute Law Revision Act, 1898.

7. Members of General Council.—(1.) *After the passing of this Act* (b) the General Council shall consist of the following members, (c) that is to say :—

Five persons nominated from time to time by Her Majesty, with the advice of Her Privy Council, three of whom shall be nominated for England, one for Scotland, and one for Ireland :—

One person chosen from time to time by each of the following bodies :—

The Royal College of Physicians of London ;
 The Royal College of Surgeons of England ;
 The Apothecaries Society of London ;
 The University of Oxford ;
 The University of Cambridge ;
 The University of London ;
 The University of Durham ;
 The Victoria University, Manchester ;
 The Royal College of Physicians of Edinburgh ;
 The Royal College of Surgeons of Edinburgh ;
 The Faculty of Physicians and Surgeons of Glasgow ;
 The University of Edinburgh ;
 The University of Glasgow ;
 The University of Aberdeen ;
 The University of St. Andrews ;
 The King's and Queen's College of Physicians in Ireland ;
 The Royal College of Surgeons in Ireland ;
 The Apothecaries Hall of Ireland ;
 The University of Dublin ;
 The Royal University of Ireland :

Three persons elected from time to time by the registered medical practitioners resident in England :

(b) The words in italics were repealed by the Statute Law Revision Act, 1898.

(c) But the following changes and additions should be noted :—

The Faculty of Physicians and Surgeons of Glasgow is now the Royal Faculty of Physicians and Surgeons of Glasgow.

The King's and Queen's College of Physicians in Ireland is now the Royal College of Physicians of Ireland.

By the Irish Universities Act, 1908, the Royal University of Ireland has been dissolved, and each of the newly constituted universities—the National University of Ireland and the Queen's University of Belfast—is entitled to choose a member.

The right to choose a member has, by Acts subsequent to 1886, been conferred upon each of the Universities of Birmingham, Bristol, Leeds, Liverpool, Sheffield, and Wales.

Pursuant to an Order in Council made under section 10 of this Act, England has now four direct representatives.

One person elected from time to time by the registered medical practitioners resident in Scotland :

One person elected from time to time by the registered medical practitioners resident in Ireland.

(2.) *The provisions of this section relating to the representation of the Universities of Edinburgh and Aberdeen shall take effect on the occurrence of the first vacancy in the office of the person representing those Universities at the time of the passing of this Act, and the provisions of this section relating to the representation of the Universities of Glasgow and St. Andrews shall take effect on the occurrence of the first vacancy in the office of the person representing such last-mentioned Universities at the time of the passing of this Act ; but (d) nothing in this section shall affect the duration of the term of office of any person who at the time of the passing of this Act is a member of the General Council.*

* * * * *

26. Provisions as to 41 & 42 Vict. c. 33.—It is hereby declared that the words “title, addition, or description,” where used in the Dentists Act, 1878, include any title, addition to a name, designation, or description, whether expressed in words or by letters, or partly in one way and partly in the other.

There shall be repealed so much of section four of the Dentists Act, 1878, as provides that a prosecution for any of the offences above in that Act mentioned shall not be instituted by a private person, except with the consent of the General Council or of a branch council, and a prosecution for any such offences may be instituted by a private person accordingly.

Notwithstanding anything in section five of the Dentists Act, 1878, the rights of any person registered under the Dentists Act, 1878, to practise dentistry or dental surgery in any part of Her Majesty’s dominions other than the United Kingdom shall be subject to any local law in force in that part.

* * * * *

Definitions.

27. In this Act, unless the context otherwise requires,—
The expression “part of the United Kingdom” means, according to circumstances, England, Scotland, or Ireland :

(d) The words in italics were repealed by the Statute Law Revision Act, 1898.

The expression "British possession" means any part of Her Majesty's dominions exclusive of the United Kingdom, but inclusive of the Isle of Man and the Channel Islands; and where parts of such dominions are under both a central and a local legislature, all parts under one central legislature are for the purposes of this definition deemed to be one British possession :

The expression "local law" means an Act or Ordinance passed by the legislature of a British possession :

The expression "the appointed day" means the 1st of June 1887, or such other day in June 1887 as may be appointed by the Privy Council :

The expression "medical corporation" means any body in the United Kingdom, other than a university, for the time being competent to grant a diploma or diplomas conferring on the holder thereof, if he has passed a qualifying examination, the right of registration under the Medical Acts :

The expression "registered medical practitioner" means any person for the time being registered under the Medical Acts :

The word "diploma" means any diploma, degree, fellowship, membership, licence, authority to practise, letters testimonial, certificate, or other status or document granted by any university, corporation, college, or other body, or by any departments of or persons acting under the authority of the government of any country or place within or without Her Majesty's dominions :

The expression "medical diploma" means a diploma granted in respect of medicine, surgery, and midwifery, or any of them, or any branch of medicine or surgery :

The word "person" includes a body of persons, corporate or not corporate :

The expression "the Medical Acts" means the Medical Act, 1858, and any Acts amending the same, passed before the passing of this Act.

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THE PERJURY ACT, 1911 (1 & 2 GEO. 5, CAP. 6)

6. If any person—

- (a.) procures or attempts to procure himself to be registered on any register or roll kept under or in pursuance of any public general act of parliament for the time being in force of persons qualified by law to practise any vocation or calling; or
- (b.) procures or attempts to procure a certificate of the registration of any person on any such register or roll as aforesaid, by wilfully making or producing or causing to be made or produced either verbally or in writing, any declaration, certificate, or representation which he knows to be false or fraudulent, he shall be guilty of a misdemeanour and shall be liable on conviction thereof or indictment to imprisonment for any term not exceeding twelve months, or to a fine, or to both such imprisonment and fine.

7. (1.) Every person who aids, abets, counsels, procures, or suborns another person to commit an offence against this act shall be liable to be proceeded against, indicted, tried and punished as if he were a principal offender.

(2.) Every person who incites or attempts to procure or suborn another person to commit an offence against this act shall be guilty of a misdemeanour, and, on conviction thereof or indictment, shall be liable to imprisonment, or to a fine, or to both such imprisonment and fine.

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